IN THE

Supreme Court of the United States

GENERAL ABDULSALAMI ABUBAKAR, PETITIONER

v.

CHIEF ANTHONY ENAHORO, DR. ARTHUR NWANKWO, FEMI ABORISADE, OWENS WIWA, C.D. DOE, CHIEF GANI FAWEHINMI, and HAFSAT ABIOLA, individually and on behalf of the estate of her deceased father CHIEF M.K.O. ABIOLA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United Court of Appeals for the Seventh Circuit erred by holding that the that Petitioner was not immune under the Foreign Sovereign Immunity Act where he was sued for actions taken in the course of his position as a public official?

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The decision of the United States Court of Appeals (7th Circuit, Case No. 03-3089, Decided May, 23, 2005) is attached, and reprinted in the Appendix to the Petition for Certiorari. The decision of the United Stated District Court for the Northern District of Illinois is reported at 267 F. Supp. 2d 907, and reprinted in the Appendix to the Certiorari.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit on May 23, 2005 entered a judgment (Pet. App.1), upholding the decision of the United States District Court for the Northern District of Illinois (Pet. App.2) Petitioner timely sought and obtained an extension of time to file a Write of Certiorari till October 20, 2005. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Section 1604 of the Foreign Sovereign Immunities Act ("FSIA") (Doc. 45). 28 U.S.C. §1602, *et seq.* provides in its pertinent part:

> § 1604. Immunity of a foreign state from jurisdiction.
>
> Subject to existing international agreements to which the United States is a party at the time of the enactment of this Act a *foreign state* shall be immune from the jurisdiction of the courts of the

ited States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. §1604 (emphasis added). A "foreign state" is defined as:

> § 1603. Definitions.
>
> For purposes of this chapter—
>
> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an *agency or instrumentality* of a foreign state as defined in subsection (b).

28 U.S.C. §1603 (emphasis added). Finally, an "agency or instrumentality" is defined as:

> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) *which is a separate legal person, corporate or otherwise,* and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. §1603(b).

STATEMENT OF THE CASE

A. Factual Background

Respondents, Nigerian citizens, brought this case against various Nigerian government officials, alleging they had been wrongfully detained, assaulted, and tortured while in Nigeria from 1993-98. Respondents' amended complaint was only against Petitioner. Starting in 1993, Petitioner was alleged to be a "principal member of the Armed Forces Ruling Council (AFRC) and Provisional Ruling Council (PRC)" under the prior Heads of State of Nigeria. After a series of Nigerian leaders, Petitioner took over leadership of the Republic of Nigeria in 1998.

Respondents alleged that the PRC "was the highest decision making body of the military junta" which was then the controlling body. Petitioner was a member at all times of the PRC which was in control of the government, and "all acts of Government were subject to the ultimate approval of the Provisional Ruling Council". Nigeria was governed by the PRC from 1993 until Petitioner returned the country to a democracy.

Respondents alleged Petitioner was the Chief of the Defense Staff, and a "top ranking member/functionary of the military junta". As the Chief of Defense and a "principal member" of the PRC, Petitioner occupied "the third highest [m]ilitary and [p]olitical position in Nigeria between 1993 and 1998". Around December 1998, Petitioner became second in command to the PRC chairman. Upon the death of the chairman in June 1998, Petitioner became the head of

state and leader of Nigeria. Respondents alleged that Petitioner released political detainees and activists.

Petitioner is sued for injuries "inflicted under color of law and under color of official authority by public officials and other persons acting in an official capacity". Respondents alleged that at all times, Petitioner and unnamed persons "acted within the scope of their respective employments (sic) as officers and members of the military junta". Respondents asserted that Petitioner was responsible for the actions of the PRC, the governing body, from November 1993 through May 1999. He acted as "a member/chairman" of the PRC on behalf of the military government.

One Respondent, Dr. Nwankwo, testified that after Petitioner took over as head of state, he promised he would return the government to civilian control, and Petitioner "kept that promise".

On May 29, 1999, less than a year after taking office around June 1998, Petitioner returned Nigeria to a democracy. Since the return to democracy, confessed murderers and some members of the PRC have been arraigned on the charges of murder of one Respondent's decedent.

Petitioner Raised the Foreign Sovereign Immunity Act and The District Court and the Court of Appeals Ruled It Did Not Apply

Petitioner moved summary judgment based on, *inter alia*, the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. §1602, *et seq.* The District Court denied, in part, the Petitioner's motion for summary judgment. It rejected Petitioner's claim he was immune under the FSIA by its order of June 17, 2003.

It found the "act makes no mention of any immunity afforded to individuals". It held that the FSIA did not provide immunity to Petitioner when he was head-of-state. It concluded that defendant was immune under common law immunity, but only for the year he was head-of-state before Petitioner returned Nigeria to a democracy.

Petitioner moved to reconsider. In support of the motion, he noted that the court had overlooked defendant's assertion that FSIA immunity while he was serving in other positions with the government, including as a high- ranking official and member of the Provisional Ruling Council. He sought reconsideration because "the FSIA provides immunity for individuals of the government sued in their capacity as agents of the government".

The District Court orally denied the motion for the reasons stated in open court. Defendant appealed to the Seventh Circuit. The Court of Appeals concurred with the District Court holding that FSAI immunity does not apply to individuals. The Circuit erroneously departed from the ruling on the same point of law in the case of *Chuidian v. Philippine National Bank, 912 F.2d 1095, 1101 (9th Cir. 1990).*

SUMMARY OF THE ARGUMENT

The District Court erred in holding that this Petitioner was not immune under the Foreign Sovereign Immunities Act of 1976. Respondents are Nigerian citizens who sued this Petitioner for official conduct taken while serving in the capacity as a Nigerian public official and as a member of the ruling council. All the challenged conduct occurred in Nigeria.

The District Court erroneously held that the FSIA did not apply to individuals, concluding instead that Petitioner was only immune under common law head-of-state immunity for the year he served as president. When the statute is read in its entirety, it is clear that public officials whose challenged actions were taken in the course of their governmental position are entitled to immunity. The Congressional intent was to remove the determination of foreign sovereign immunity from the State Department and give it to the courts. In enacting the FSIA, Congress codified the "restrictive theory" of foreign sovereign immunity, which provided immunity to individuals and states for public, not private, actions.

The circuits, when confronted with the issue of whether the FSIA applies to individuals in civil actions, have held that it does apply. The District Court erred in relying on state and federal trial court decisions instead of appellate court decisions. District Court decisions are not precedent for stare decisis; they are only binding under preclusion principles in the same case. Regardless, the District Court decisions support the Petitioner's assertion of FSIA immunity here.

Because this issue resolves all claims, this Court should reverse and enter judgment for the Petitioner.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN ITS CONSTRUCTION OF THE FSIA.

The issue before this Court is whether the Petitioner, an individual whose alleged conduct was solely in his capacity as a non-head-of-state officer of a foreign state, is afforded immunity under the Foreign

Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1602, *et seq.* The Court of Appeals denied the appeal, holding that the FSIA did not apply to individuals. Instead, the Seventh Circuit concurring with District Court held Petitioner had no immunity under FSIA.

The Court of Appeals erred in denying FSIA immunity to Petitioner who was sued only for public acts taken as a member of the ruling council and official of the government . The FSIA provides immunity to individuals who have been sued civily for conduct taken in their official capacities as employees or agents of foreign governments. This Court should reverse.

A. The FSIA Immunity Protects Government Actors Sued for Acts Taken on Behalf of the Foreign Government.

When construing a statute, the "starting point" is the statutory text. *Desert Palace Inc. v. Costa*, 539 U.S., 123 S.Ct. 2148, 2153 (2003). It is assumed that the ordinary meaning of the statutory language expresses Congress' purpose, *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990), and it is a court's duty to give effect to congressional intent. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n.9 (1984).

Section 1604 of the FSIA provides:

> § 1604. Immunity of a-foreign state from jurisdiction.
>
> Subject to existing international agreements to which the United States is a party at the time of the enactment of this Act a *foreign state* shall be

> immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. §1604 (emphasis added). A "foreign state" is defined as:

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28 U.S.C. §1603 (emphasis added). Finally, an "agency or instrumentality" is defined as:

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> > (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
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> > (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. §1603(b).

Under the definitions, the immunity applies to individuals or legal persons who act as an instrumentality or agent of that government. That FSIA immunity applies to individuals is further manifested by the exceptions to the immunity. For example, § 1605(a)(7) provides that if there is an action "by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment or agency, there would be jurisdiction . . ." 28 U.S.C. §1605(a)(7). "National" in this Act incorporates the definition of the Immigration and Nationality Act, which provides: The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. §1101(a)(22).

When the statute is read in its entirety and in conjunction with the definitions, it manifests Congress' intent that the immunity does not merely apply to the country itself or subdivisions. This provision also applies to individuals who are sued in their representative capacity for actions taken as a governmental official who act on behalf of the government, as here. *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1209 (9th Cir. 2001); *Jungquist v. Sheikh Sultan Bin Khalifa Al Nanyan*, 115 F.3d 1020, 1028 (D.C.Cir 1997). Indeed, a government cannot act except through the individuals who are governing *vis-à-vis* the positions they hold. "'Individuals acting in their official capacities are considered agenc[ies] or instrumentalit[ies] of a foreign state.'" *Jungquist*, 115 F.3d at 1027.

The Respondents' amended complaint is clear that they have sued this Petitioner for acts taken as a government official. His role, at all times, was either as the leader of Nigeria (who returned the country to democracy) and as the "principal member" of the ruling councils. Respondents alleged that the PRC "was the highest decision making body of the military junta" which was then the controlling body. "All acts of Government were subject to the ultimate approval of the Provisional Ruling Council," of which Petitioner was a member. Respondents alleged Petitioner was the Chief of the Defense Staff, and a "top ranking member/functionary of the military junta". As the Chief of Defense and a "principal member" of the PRC, Petitioner occupied "the third highest Military and Political (sic) position in Nigeria between 1993 and 1998". According to Respondents, Petitioner became second in command to the PRC chairman around December 1998, and about six months later, upon the death of the chairman in June 1998, Petitioner became the head of state and leader of Nigeria .

Without question, Respondents have not sued this Petitioner in his individual capacity, but as an official of the Nigerian government. They specifically allege that all actions were taken in Petitioner's official capacity. They allege Petitioner (and unidentified persons) "acted within the scope of their respective employments (sic) as officers and members of the military junta". He is sued for injuries "inflicted under color of law and under color of official authority by public officials and other persons acting in an official capacity". Respondents asserted a theory of vicarious liability against this Petitioner because he is sued not for his own actions, but for others' actions, seeking to hold him responsible solely because he sat on a

governing council from November 1993 through May 1999. They allege he only acted as "a member/chairman" of the PRC on behalf of the military government.

These allegations are clear that Respondents' claims are brought against him based on his official position with the Nigerian Government. As such, he is immune.

The definition of "foreign state" encompasses an individual person who is acting on behalf of the government. *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990). The language of §1603(b)(1), which is the definition of a foreign state as "a separate legal person, corporation, or otherwise," establishes that individuals are protected by the umbrella of FSIA's immunity. The terms "agency," "instrumentality," "organ," "entity," and "legal person" are sufficiently broad in encompass individual persons. *Id.* If Congress intended to eliminate governmental officials, it could clearly have done so. *Id.* Moreover, to reach such a conclusion would defeat Congress' intent to provide immunity to foreign sovereign exempting only narrow situations. *Id.*

B. Congress Codified the Restrictive Theory to Provide Immunity to Foreign Sovereigns.

The historical background to this statute manifests Congressional intent to make not only the foreign government, but also individuals who act on behalf of that government, immune. Prior to the passage of the FSIA, the State Department had primary responsibility for deciding questions of sovereign immunity. *Verlinden B.V. v. Central Bank of*

Nigeria, 461 U.S. 480, 487 (1983). The FSIA was enacted in 1976 "to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'" *Id.* at 488, *citing* H.R.Rep. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S. Code & Cong. Admin. News, p. 6604.

Before 1952, when faced with the issue of foreign sovereign immunity, courts consistently deferred to the Executive Branch, because the issue of foreign sovereign immunity was "a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden*, 461 U.S. at 486. In 1952, the State Department issued the Tate Letter which "announced its adoption of the 'restrictive' theory of foreign sovereign immunity" and which "confined [immunity] to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Id.* at 487. *See generally Chuidian* v. *Philippine Nat'l Bank*, 912 F.2d 1095, 1099-1101 (9th Cir. 1990).

The enactment of the FSIA was the result of "Congress' decision to deal comprehensively with the subject of foreign sovereign immunity." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 429 (1989). [T]he Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities." *Verlinden*, 461 U.S. at 488. Legislative history shows that FSIA was not intended to eliminate sovereign immunity to individuals. During the House of Representatives' subcommittee hearing, a Department of Justice representative explained that the Act would not permit

suit against an individual, as the District Court acknowledged. Congress' intent in enacting the FSIA was to eliminate the State Department's role, not eliminate the prior law that individuals, acting in their official capacities, would lose their immunity. *Chuidian*, 912 F.2d at 1101.

Under the FSIA, a foreign state is "presumptively immune from the jurisdiction of United States courts." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Unless one of the exceptions specified in the FSIA applies, a "federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia*, 507 U.S. at 355; *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) (*Amerada*). [4]

In enacting the FSIA, Congress codified the restrictive theory of foreign sovereign immunity. *Amerada*, 488 U.S. at 359-60, 363. Under the

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[4] The various exceptions in §§ 1605 and 1607 were not raised as a defense by Respondents to the immunity asserted by defendant. These include: waiver of immunity by the foreign state; commercial activities; actions involving rights in property; tort claims for the acts occurring in the United States; actions based on agreements made by or with the foreign state; and intentional torts by foreign states designated as state sponsors of terrorism. Nigeria is not recognized as a state sponsor of terrorism. *See* http://usinfo.state.gov/topical/pol/terror/02052101.htm. Only Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria remain on the United States' list of state sponsors of international terrorism. The list has remained unchanged since Sudan was added in 1993. None of the alleged conduct, (all of which allegedly occurred in Nigeria), falls within any of these exceptions. To fit within the "tortious act" exception, both the act and injury "must occur in the United States." *Wolf v. Federal Republic of Germany*, 95 F.3d 536, 542 (7th Cir. 1996) (citations omitted), 520 U.S. 1106 (1997).

restrictive theory, a foreign state is immune for "sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*)." *Saudi Arabia*, 507 U.S. at 359-60. "[A] foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature." *Saudi Arabia*, 507 U.S. at 361. Although a foreign state may have abused its police powers, and "however monstrous such abuse undoubtedly may be," a foreign state's exercise of police power is "sovereign in nature." *Saudi Arabia*, 507 U.S. at 361.

In *Saudi Arabia*, the plaintiff alleged that while in Saudi Arabia, he reported safety defects in hospital equipment in Saudi Arabia. In retaliation for this conduct, he was subjected to torture, beatings, food deprivation, and was imprisoned in shackles. *Saudi Arabia*, 488 U.S. at 353-55. The Court held that because the conduct did not fit within any exception of the FSIA, defendants were immune from suit in the United States under the FSIA. *Id.* at 362-63. *See also* 507 U.S. at 371 (Kennedy, J concurring in part and agreeing that defendants were immune from claims of unlawful arrest, imprisonment and torture of the plaintiffs "by the Saudi police acting in their official capacities" and did not fall within the "commercial activity exception" of the FSIA). *Accord Wolf*, 95 F.3d at 542-44 (holding defendant had FSIA immunity and the "commercial activity" and "tort" exceptions did not apply, notwithstanding allegations of torture at the hands of Nazis).

Here, as in *Saudi Arabia* and *Wolf*, defendant is immune under the FSIA, even though plaintiffs assert tort claims and allege they were tortured. The alleged abuse of power by Nigerian officials for actions taken in

Nigeria are the acts of a sovereign and United States courts lack jurisdiction over this suit under the FSIA. *Saudi Arabia*, 507 U.S. at 361.

Here, Petitioner is sued for alleged conduct occurring solely in his capacity as a government official. He is sued for serving as a member and/or chairman of the ruling council and military junta. Respondents specifically allege that all of the alleged wrongful conduct attributed to the Petitioner was "inflicted under color of law and under color of official authority by public officials and other persons acting in an official capacity". These allegations establish Petitioner has FSIA immunity. To allow unrestricted suits against individual foreign officials acting in their official capacities, but not against the country itself, would permit a plaintiff to sue the country indirectly. *Chuidian*, 912 F.2d at 1102.

Plaintiff sued an individual specifically alleging all acts were taken in Petitioner's official capacity. These allegations are, in effect, allegations against the Nigerian government:

> It is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly. *Monell v. Department of Social Services.*, 436 U.S. 658, 690 n.55 (1978) ("[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent."); *Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1382 n.5 (9th Cir. 1988) ("A claim alleged against a state officer acting

> in his official capacity is treated as a claim against the state itself."), *cert. denied*, 488 U.S. 1006 (1989).

Chuidian, 912 F.2d at 1101-02.

If the FSIA allows suits against "individual foreign officials acting in their official capacities" this "would amount to a "blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly." *Id.* at 1102. Defendant, sued in his capacity as an agent of the state for his public actions, is entitled to immunity under the FSIA. The District Court erred in concluding otherwise, and this Court should reverse.

C. All Circuits Considering Civil Claims Hold Individuals Have Immunity Under the FSIA.

The majority of circuits follow the interpretation first enunciated by the Ninth Circuit in *Chuidian*, which held that the FSIA provides immunity for individuals sued for acts taken in their official capacity. 912 F.2d at 1103. *Accord In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993). In *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002), the Sixth Circuit cited *Chuidian* for the proposition that individuals may not have FSIA immunity for acting outside their authority, but if authorized to perform the alleged acts, they are immune even if the acts are performed with improper motives. Similarly, in *Byrd v. Corporacion Forestal y Industrial de Olancho, S.A.*, 182 F.3d 380, 388 (5th Cir. 1999), the Fifth Circuit held that the FSIA extends to

protect individuals acting within their official capacity as officers of the foreign state and ceases when the individual acts beyond his official capacity.

The District of Columbia Circuit has held: "Individuals acting in their official capacities are considered 'agencies or instrumentalities of a foreign state.'" *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C.Cir. 1997). In *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996), that same Circuit held because the Deputy Governor of Jordan was sued in his official capacity, he qualified as an "agency" or "instrumentality" of the foreign state and was entitled to immunity under the FSIA.

The opposite interpretation of the statutory language, which is mentioned by only one circuit court in reviewing a criminal conviction, is that the absence of any specific mention of head-of-state immunity in the FSIA equates to an intended exclusion of heads-of-state from the immunity afforded by the FSIA. *United States v. Noriega*, 117 F.3d 1206, 1212, *reh'g denied*, 128 F.3d 734 (11th Cir. 1997), *cert. denied*, 523 U.S. 1060 (1998). *Noriega* did not offer any further explanation of the basis of its interpretation of the silence, but decided that immunity for heads-of-state must be determined by pre-FSIA common law head-of-state immunity. [2] *Id.*

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[2] The District Court also held that common law immunity survived FSIA in concluding that this Petitioner was immune under the common law, but only for the year he was the president of Nigeria. Because Petitioner prevailed, he has not and could not challenge this holding, which appears ill-founded under *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 437-38 (1989). Plaintiffs did not file a cross-appeal on this point under the doctrine of pendent jurisdiction. *Swint v.*

Noreiga is inapposite, presenting unique facts not found in any other federal court decisions. *Noreiga* alone involved review of a criminal conviction of the defendant on drug-related charges. *Noriega*'s conclusion is not surprising, since the Supreme Court has stated that the FSIA governs civil -- not criminal -- actions against foreign states. *Verlinden*, 461 U.S. at 488. Moreover, it is not clear from the *Noreiga* opinion that the defendant asserted a claim for immunity under the FSIA. Rather, the opinion suggests that the defendant sought immunity under common law head-of-state immunity, so its comment on FSIA would be *dicta*. *Noreiga*, 117 F.3d at 1211. In addressing the issue of head-of-state immunity, *Noreiga* raised the applicability of FSIA immunity and determined that the defendant was not entitled to immunity under the FSIA because the Act was silent as to its applicability to criminal cases and to heads-of-state. *Id.* at 1212. *Noriega* is factually inapposite, and involves a criminal conviction, and FSIA immunity only applies to civil claims. *Noreiga* provides no support for neither the lower courts' decisions. Under pre-FSIA common law, Petitioner would be immune as an individual public official. *Chuidian*, 912 F.2d at 1099-1100, citing

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Chambers County Comm'n, 514 U.S. 35, 50-51 (1995), so this issue is not before this Court. However, if plaintiffs had appealed this issue, the lower court's ruling defendant is immune for acts taken while he was president would properly have been affirmed on an alternative basis. *Baucher v. E. Ind. Prod. Credit Ass'n*, 906 F.2d 332, 335 (7th Cir. 1990). For the same reasons that this defendant has FSIA immunity for his actions taken in his official position while serving on ruling councils and as the head of the military, he is immune for the year he was president.

Restatement (Second) of Foreign Relations Law, §66 (1965).

CONCLUSION

For the foregoing reasons, Petitioner General Abdulsalami Abubakar respectfully requests this Court to reverse the judgment of Court of Appeals in so far it pertains to the question before this Court, enter judgment in his favor, and for such other relief as this Court deems proper.

Respectfully submitted,

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No. 03-3089

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHIEF ANTHONY ENAHORO, DR. ARTHUR NWANKWO, FEMI ABORISADE, OWENS WIWA, C.D. DOE, CHIEF GANI FAWEHINMI, and HAFSAT ABIOLA, individually and on behalf of the estate of her deceased father CHIEF M.K.O. ABIOLA,
Plaintiffs-Appellees,

v.

GENERAL ABDULSALAMI ABUBAKAR,
Defendant-Appellant.

January 10, 2005, Argued

May 23, 2005, Decided

COUNSEL: For ANTHONY ENAHORO, ARTHUR NWANKWO, FEMI ABORISADE, OWENS WIWA, HAFSAT ABIOLA, individually and on behalf of the estate of her deceased father Chief M.K.O. Abiola, Plaintiffs-Appellees: Kayode O. Oladele, WHITFIELD & ASSOCIATES, Detroit, MI.

For ABDULSALAMI ABUBAKAR, General, Defendant-Appellant: Kevin B. Duckworth, HINSHAW & CULBERTSON, Chicago, IL; Ephraim Ugwuonye, ECU ASSOCIATES, Washington, DC.

For UNITED STATES OF AMERICA, Amicus Curiae: Robert M. Loeb, DEPARTMENT OF

JUSTICE, Civil Rights Division, Appellate Section, Washington, DC.

JUDGES: Before CUDAHY, KANNE, and EVANS, Circuit Judges.

OPINIONBY: EVANS

OPINION: EVANS, *Circuit Judge.* A courtroom in Chicago, one would think, is an unlikely place for considering a case involving seven Nigerian citizens suing an eighth Nigerian for acts committed in Nigeria. It sounds like the sort of fare that would be heard in a courtroom on the African continent. But this case ended up in Chicago, and that leads us to consider the claims of seven Nigerian citizens against a Nigerian general over [*2] alleged torture and murder in Nigeria. The path the plaintiffs are pursuing is, as we shall see, quite thorny.

The plaintiffs make allegations of torture and killing at the hands of the military junta that ruled Nigeria from November 1993 until May 1999. The defendant, General Abdulsalami Abubakar, was a member of the junta and was Nigeria's head of state for the last year of the junta's reign. Alleging that he was behind the atrocities, the plaintiffs sued General Abubakar and claimed that the United States district court had jurisdiction under 28 U.S.C. §§ 1331 and 1350. The district court considered motions for dismissal and for summary judgment. The specific issue which gives rise to this interlocutory appeal is the decision that the Foreign Sovereign Immunity Act of 1976 (FSIA), 28 U.S.C. §§ 1602 et seq., does not apply to individuals and thus General Abubakar is not immune from suit. The

court determined, however, that General Abubakar is entitled to common law immunity for the year that he was head of state. Plaintiffs do not contest the latter finding.

The facts as we recite them come mainly from the plaintiffs' claims which, [*3] at this stage of the suit, we accept as true. The situation in Nigeria at the time of these events was unstable. On December 31, 1983, General Muhammed Buhari staged a military coup that overthrew Nigeria's democratically elected president and set off a series of coups and forced abdications. A number of military rulers were overthrown, one after another, and in June 9, 1998, defendant Abubakar assumed control of the regime following the sudden death of General Sani Abacha. Finally, a presidential election was held, and in May 1999, Nigeria had its first elected civilian president in 15 years.

During the various military regimes between 1983 and 1999, the highest governmental body was the Provisional Ruling Council (PRC). It was composed of military officials and a few civilians; whoever was the current military ruler was the chairman of the PRC. According to the complaint, the PRC ruled by decree and curtailed civil liberties. During this time, Abubakar occupied the third highest military and political position in Nigeria.

Plaintiff Hafsat Abiola is the daughter of Nigerian pro-democracy activists; she claims that Abubakar is responsible for the deaths of her parents. Her father, [*4] M.K.O. Abiola, in fact, was a candidate for president in 1993. Plaintiff Abiola contends that the early election returns showed that her father won the

vote, but the military regime nullified the election, leading to violent clashes between miliary forces and civilians. M.K.O. Abiola unsuccessfully challenged the election's nullification through the Nigerian court system and sought Nigerian and international support for the recognition of the election results. In June 1994, M.K.O. Abiola declared himself the president of Nigeria. He was promptly arrested and charged with treason. According to the complaint, he was kept in prison under inhumane conditions, was tortured, and denied access to lawyers, doctors, and his family. He died in prison in July 1998, shortly after General Abubakar assumed control of the military regime.

Plaintiff Abiola's mother, Alhaja Kudirat Abiola, was also a pro-democracy activist. After her husband was imprisoned she began a campaign to free him and continued a call for the democratization of Nigeria. The complaint alleges that she received menacing telephone calls warning her of the consequences of continuing to demand the release of her husband. In June [*5] 1996, she was murdered in broad daylight in her car on the streets of Lagos City. She had been shot multiple times.

Plaintiff Anthony Enahoro is a political activist who played a leading role in Nigeria's independence from Great Britain in 1960. In 1994, when he was 70 years old, he was arrested and imprisoned by the junta for 4 months. During his detention he was not provided medical treatment even though he was a diabetic. Plaintiff Arthur Nwankwo, another political activist, was arrested in June 1998. He claims he was stripped naked, flogged, and taken away in the trunk of a car. He also was denied medical treatment for the 2 months he was in custody.

Based on these allegations, the complaint states seven claims: torture; arbitrary detention; cruel, inhuman and degrading treatment; false imprisonment; assault and battery; intentional infliction of emotional distress; and wrongful death.

As we said, General Abubakar appeals from the denial of immunity under the FSIA. The preliminary issue is whether we have appellate jurisdiction over the appeal. We conclude that we do.

We stated in Rush-Presbyterian-St.Luke's Medical Center v. The Hellenic Republic, 877 F.2d 574, 576 n.2 (7th Cir. 1989): [*6]

Since sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits, the denial of a claim of sovereign immunity is an immediately appealable interlocutory order under the "collateral order doctrine" of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-47, 69 S. Ct. 1221, 1225-26, 93 L. Ed. 1528 (1949). *See* Compania Mexicana de Aviacion, S.A. v. United States Dist. Court, 859 F.2d 1354, 1358 (9th Cir. 1988) (per curiam); Segni v. Commercial Office of Spain, 816 F.2d 344, 347 (7th Cir. 1987).

Our is not an isolated opinion. *See* S & Davis Int'l, Inc. v. The Republic of Yemen, 218 F.3d 1292 (11th Cir. 2000); In re Republic of Philippines, 309 F.3d 1143 (9th Cir. 2002); Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 325 U.S. App. D.C. 117, 115 F.3d 1020 (D.C. Cir. 1997). That said, we turn to the appeal.

General Abubakar contends that he has immunity for official conduct taken while he was a Nigerian public official and a member of the ruling council. Underlying his argument is his [*7] contention that the FSIA applies to individuals in government, not just foreign governments and agencies.

The historical underpinnings of the FSIA go back almost 200 years. In Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 3 L. Ed. 287 (1812), the Supreme Court recognized the immunity of foreign sovereigns from suits brought in the courts of the United States. Justice Marshall said that "as a matter of comity, members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign." Republic of Austria v. Altmann, 541 U.S. 677, 159 L. Ed. 2d 1, 124 S. Ct. 2240 (2004) (quoting M'Faddon, 11 U.S. at 136). For the next 165 years, the executive branch decided whether a foreign nation was entitled to immunity. The usual procedure was that the State Department would provide the court with a "suggestion of immunity" and the court would dismiss the suit. *See* 15 Moore's Federal Practice, § 104.02 (Matthew Bender 3d ed.).

But in 1952, the State Department adopted what [*8] has become known as the "restrictive theory" of sovereign immunity. Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 76 L. Ed. 2d 81, 103 S. Ct. 1962 (1983). Under this theory, immunity is limited to suits involving the sovereign's public acts and does not extend to cases arising out of strictly commercial actions.

In 1976, Congress got into the act, passing the FSIA. Under the FSIA, a foreign state is "presumptively immune from the jurisdiction of United States courts . . . ." Saudi Arabia v. Nelson, 507 U.S. 349, 355, 123 L. Ed. 2d 47, 113 S. Ct. 1471 (1993). That immunity exists unless one of the statutory exceptions to immunity applies. *See* 28 U.S.C. §§ 1605 & 1607. Ironically, however, the FSIA is also the sole basis for jurisdiction over a foreign state. Title 28 U.S.C. §§ 1604 and 1330(a) work together. Section 1330 confers jurisdiction when the state is not entitled to immunity under one of the exceptions in the FSIA. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989).

In this case, no one contends that an exception to immunity applies. If Abubakar is covered [*9] by the FSIA, he is immune; no exception is relevant; and the suit would have to be dismissed. Therefore, the only issue is whether the statute applies to individuals, who are connected with the government, as opposed to the state itself and its agencies. We have recently looked at a similar question. Ye v. Zemin, 383 F.3d 620 (7th Cir. 2004), involved a head of state, and we concluded that the FSIA did not apply to heads of state: "The FSIA defines a foreign state to include a political subdivision, agency or instrumentality of a foreign state but makes no mention of heads of state." Ye, 383 F.3d at 625. We noted that the FSIA did not seem to subscribe to Louis XIV's not-so-modest view that "L'etat, c'est moi." How much less, then, could the statute apply to persons, like General Abubakar, when he was simply a member of a committee, even if, as seems likely, a committee that ran the country?

The language of the Act supports our conclusion. The over-riding concern of the Act, as set out in 28 U.S.C. § 1602, is allowing judgments against foreign sovereigns "in connection with their commercial activities." The statute was passed [*10] so immunity determinations in such contexts would be made "by courts of the United States and of the States . . .", not by the executive branch of the government. Section 1604 provides that a "foreign state" is immune unless certain exceptions apply. Under § 1603(a), a foreign state includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state . . . ." In turn,

(b) an "agency or instrumentality of a foreign state" means any entity--(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country.

The definition does not explicitly include individuals who either head the government or participate in it at some high level.

Abubakar argues, however, that "separate legal person" must mean an individual. We suppose it could. But if it was a natural person Congress intended [*11] to refer to, it is hard to see why the phrase "separate legal person" would be used, having as it does the ring of the familiar legal concept that corporations are persons,

which are subject to suit. Given that the phrase "corporate or otherwise" follows on the heels of "separate legal person," we are convinced that the latter phrase refers to a legal fiction--a business entity which is a legal person. If Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms.

It is true, however, that this issue is a long way from being settled. The FSIA has been applied to individuals, but in those cases one thing is clear: the individual must have been acting in his official capacity. If he is not, there is no immunity. For instance, a Korean official being sued by a personal family employee was not immune because he was not acting within the scope of his official duties. Park v. Shin, 313 F.3d 1138 (9th Cir. 2002).

That same court, though, in Chuidian v. Philippine National Bank, 912 F.2d 1095, 1101 (9th Cir. 1990), looked at the statute and concluded that its language--the [*12] terms agency, instrumentality, organ, entity, and legal person--"while perhaps more readily connoting an organization or collective, do not in their typical legal usage necessarily exclude individuals." Because Congress did not exclude individuals, the court concluded that if the individual was acting in his official capacity, the FSIA was applicable. We are troubled by this approach--that is, by saying Congress did not exclude individuals; therefore they are included. Not only does it seem upside down as a matter of logic, but it ignores the traditional burden of proof on immunity issues under the FSIA. The party claiming FSIA immunity bears the initial burden of proof of

establishing a prima facie case that it satisfies the FSIA's definition of a foreign state. Then the burden of going forward shifts to the plaintiff to produce evidence that the entity is not entitled to immunity. The ultimate burden of proving immunity rests with the foreign state. Int'l Ins. Co. v. Caja Nacional de Ahorro y Seguro, 293 F.3d 392, 397 (7th Cir. 2002); Keller v. Central Bank of Nigeria, 277 F.3d 811, 815 (6th Cir. 2002); Virtual Countries, Inc. v. Republic of S. Africa, 300 F.3d 230, 241 (2nd Cir. 2002). [*13]

A case which is similar to the one before us is In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992). Archimedes Trajano, a student, went to an open forum in the Philippines where Imee Marcos-Manotoc--the daughter of Ferdinand Marcos, the former Philippine President--was speaking. Trajano apparently asked the wrong question at the forum and was kidnaped, interrogated, and tortured to death by military intelligence personnel who were acting in part under the authority of Marcos-Manotoc. A wrongful death suit, filed in the United States District Court for the District of Hawaii, followed, and a preliminary question was whether Marcos-Manotoc was entitled to immunity under the FSIA. Because Marcos-Manotoc was in default, she was said to have admitted that she acted on her own authority and not on the authority of the Republic of the Philippines. Therefore, she was not entitled to immunity. That also meant that there was also no jurisdiction under the FSIA and that the Alien Tort Statute (ATS) was the sole basis for jurisdiction in the case.

In our case, we conclude, based on the language of the

statute, that the FSIA does not apply [*14] to General Abubakar; it is therefore also clear that the Act does not provide jurisdiction over the case. If General Abubakar were covered, the FSIA would be the only basis for subject matter jurisdiction over him. As we indicated above, the Supreme Court has said in Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989):

We think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts.

The corollary proposition in *Argentine Republic* is that the Alien Tort Statute cannot provide jurisdiction over foreign sovereigns but remains a jurisdictional basis for suits against other defendants. And the ATS is, in fact, the basis on which plaintiffs in our case claim jurisdiction.

Because we are obligated to consider our jurisdiction at any stage of the proceedings, we now turn to the ATS as it forms a basis for jurisdiction in this case. The ATS provides that

the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations [*15] or a treaty of the United States.

Our examination of the statute is particularly compelling at this time because recently (after the district court issued its decision in this case) the

Supreme Court extensively considered the ATS. Sosa v. Alvarez-Machain, 542 U.S. 692, 159 L. Ed. 2d 718, 124 S. Ct. 2739 (2004), established that the ATS is a jurisdictional statute that creates no new causes of action. The concept is not as simple as it sounds.

The *Sosa* case grew out of the capture in Mexico of a Drug Enforcement Administration agent who was taken to a house in Guadalajara, where he was tortured over the course of a 2-day interrogation and then murdered. DEA officials in the United States came to believe that Humberto Alvarez-Machain (Alvarez), a Mexican physician, was present at the house and acted to prolong the agent's life so that the interrogation and torture could be extended. Alvarez was indicted in the United States District Court for the Central District of California. The DEA asked the Mexican government to help obtain Alvarez's presence in the United States. When that failed, the DEA hired Mexican nationals, including Jose Francisco Sosa, to seize Alvarez [*16] and bring him to the United States from Mexico. Sosa and the others abducted Alvarez, held him overnight in a motel, and brought him by private plane to El Paso, Texas, where he was arrested by federal officers. Eventually, Alvarez went to trial, but the district court granted his motion for a judgment of acquittal. After returning to Mexico, Alvarez filed suit in the Central District of California against Sosa and others under the Federal Tort Claims Act, 28 U.S.C. § 2674, and the ATS.

As relevant here, Sosa argued that the action under the ATS should be dismissed because the statute merely provided the court with jurisdiction but did not authorize the courts to recognize any particular right of

action without further congressional action. On the other hand, Alvarez argued that the statute was not simply a jurisdictional grant but was authority for the creation of a new cause of action for torts in violation of international law. The Court found that the statute was intended as jurisdictional "in the sense of addressing the power of the courts to entertain cases concerned with a certain subject." At 2755. But it also reasoned that when Congress enacted the [*17] statute in 1789, it did not enact a "stillborn" statute which could not provide a claim for relief without a further statute expressly authorizing a cause of action. Examining international law at the time of enactment, the Court found that specific recognized violations of the law of nations were probably in the minds of the drafters of the ATS. These included safe conducts, infringement of the rights of ambassadors, and piracy. The Court stated:

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Although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.

At 2761.

But, the Court cautioned,

there are good reasons for a restrained conception of the discretion a federal court should exercise in

considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day [*18] law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.

At 2761-62.

In sum, "the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping . . . ." At 2764.

Alvarez's case against Sosa was properly dismissed because a "single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." At 2769.

Because the ATS provides jurisdiction over a very limited number of claims and the jurisdictional grant is so closely tied to the claim, we need to examine whether there is a claim in this case which allows for the exercise of jurisdiction. *See* Kadic v. Karadzic, 70 F.3d 232, 238 (2nd Cir. 1995) ("Because the Alien Tort Act requires that plaintiffs plead a 'violation of the law of nations' at the jurisdictional threshold, this statute requires a more searching review of the merits to establish jurisdiction [*19] than is required under the more flexible 'arising under' formula of section 1331.").

The plaintiffs before us allege significantly more appalling violations than did Alvarez. Their allegations

fall into two primary categories that the *Sosa* Court specifically recognized as violations of the law of nations: torture and killing. The Court also noted that Congress has provided an "unambiguous" basis for "federal claims of torture and extrajudicial killing" in the Torture Victim Protection Act of 1991, 106 Stat. 73. Sosa, 124 S. Ct. at 2763.[1]

This would seem to be positive news for the plaintiffs. But that may not necessarily be so. In the district court, Abubakar argued that because the plaintiffs had not complied with the exhaustion requirement in the Torture Victim Protection Act, their case should be dismissed. [*20] The district judge rejected the argument because the plaintiffs had not pled their case under the Act and therefore had no need to comply with its requirements. The implication of the district court's decision is that there are two bases for relief against torture and extrajudicial killing: the statute and independently existing common law of nations condemning torture and killing. The issue, then, becomes whether both can simultaneously exist to provide content to the ATS. In other words, does the Torture Victim Protection Act occupy the field or could a plaintiff plead under the Act and/or under the common law?

We find that the Act does, in fact, occupy the field.[2] If it did not, it would be meaningless. No one would plead a cause of action under the Act and subject himself to its requirements if he could simply plead under international law. While there is no explicit statement to this effect in *Sosa*, the implications are that the cause of action Congress provided in the Torture Victim Protection Act is the one which plaintiffs alleging

torture or extrajudicial killing must plead. As we said, the Court found that Act an "unambiguous" basis for such claims. The Court went [*21] on to say that the affirmative authority is confined to its specific subject matter, and that the legislative history says that § 1350 should "remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law," but the Court said Congress had done nothing to promote other such suits. *Id.* The Court emphasizes that "great caution" must be taken to adapt the laws of nations to private rights. It requires "vigilant doorkeeping." The Court was concerned with "collateral consequences" of making international rules privately actionable:

The subject of those collateral consequences is itself a reason for a high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make court particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs . . . . Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, [*22] if at all, with great caution.

Id. It is hard to imagine that the *Sosa* Court would approve of common law claims based on torture and extrajudicial killing when Congress has specifically provided a cause of action for those violations and has set out how those claims must proceed. As relevant to this case, then, the ATS would provide jurisdiction over

a suit against General Abubakar for violations of the Torture Victim Protection Act.

But, as we mentioned, one procedural requirement in the Act is exhaustion. Section 2(b) says:

A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

It may be that a requirement for exhaustion is itself a basic principle of international law. In *Sosa*, the European Commission filed a brief as *amicus curiae* arguing that "basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other fora such as international claims tribunals." Sosa at 2766 n.21. The Court commented that it "would certainly consider this requirement in an appropriate case" and notes that the Torture Victim Protection Act has such a requirement. *Id.*

The plaintiffs before us have not pled under the Torture Victim Protection Act, and nothing in the record indicates that they have exhausted their remedies. We will remand this case to the district court for a determination regarding whether the plaintiffs should be allowed [*24] to amend their complaint to state such a claim and, if they do, whether, in fact, the exhaustion requirement in the Torture Victim Protection Act defeats their claim. We therefore AFFIRM the decision of the district court concluding that General Abubakar is not immune from suit under

the FSIA and REMAND the case to the district court for proceedings consistent with this opinion. Each side shall bear their own costs.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Tellingly, the Torture Victim Protection Act is inserted in the United States Code under the Historical and Statutory Notes of the ATS (28 U.S.C. § 1350).

n2 The dissent cites Kadic for the proposition that the "scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act." The court, however, made this pronouncement as a gloss on H.R. Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), which stated that

(c)laims based on torture and summary executions do not exhaust the list of actions that may appropriately be covered [by the Alien Tort Act]. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

The latter statement does not, we think, necessarily say that there are now two routes for claims based on torture and killing to take. Rather, it indicates that the enactment of the Torture Victim Protection Act did not signal that torture and killing are the *only* claims which can be brought under the Alien Tort Statute. Other claims, in addition to torture and killing as provided for in the Torture Victim Protection Act, can still be recognized under the ATS as well. That issue, however, does not concern us in this case. We also think that the court in Flores v. Southern Peru Copper Corp., 343

F.3d 140 (2nd Cir. 2003), was cognizant that the relationship between the statutes was murky. In discussing what the Tort Victim Protection Act was intended to accomplish, the court said:

(N)either Congress nor the Supreme Court has definitively resolved the complex and controversial questions regarding the meaning and scope of the ATCA.

It is true that, in affirming the district court's dismissal of all claims in the case, the court in Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999), discussed separately claims under the ATS and the Torture Victim Protection Act. There was, however, no need for the court to reach difficult questions such as the relationship between the two statutes when the plaintiff's complaint failed entirely. Further, that the ATCA confers a private right of action is not contested in the case before us (as it was in Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996)), nor is the fact that one interpretation of the Torture Victim Protection Act is that it codified existing law, especially as set out in Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980). In short, we think that the law on the issue before us is far from settled in the courts of appeals, but that the Supreme Court in Sosa offers us the best guidance as to what the relationship between these two statutes should be.

DISSENT BY: CUDAHY (In Part)

DISSENT: CUDAHY, *Circuit Judge*, dissenting in part. The majority remands this case because, though

General Abubakar may not claim sovereign immunity for alleged human rights abuses, "the plaintiffs before us have not pled under the Torture Victim Protection Act and nothing in the record indicates that they have exhausted their remedies." Maj. Op. at 16. While I agree that the defendant General Abubakar ultimately cannot claim sovereign immunity for the acts of torture and extrajudicial killing alleged in this case, I can-not agree that plaintiffs' suit is precluded by their failure to bring a claim under the Torture Victim Protection Act of 1991 (TVPA) or by their failure to exhaust legal remedies in Nigeria.

The Relationship Between the ATCA [*25] and the TVPA

The majority's opinion raises an important legal question: whether the TVPA, 28 U.S.C. § 1350, note, P.L. 102-256, effectively restricts or precludes an alien's ability to bring claims for torture or extrajudicial killing under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350.[1] A host of factors strongly indicate that it does not.

First, both the plain text and the legislative history of the TVPA indicate that it was meant to expand, not restrict, the remedies available under the ATCA. The text of the TVPA itself contains no implicit or explicit repeal of the ATCA, nor does it indicate a Congressional intent to limit or supercede the ATCA in any way. It is a long-standing [*26] canon of statutory construction that repeals by implication are disfavored: "Where there are two acts upon the same subject, effect should be given to both if possible . . . . the intention of the legislature to repeal must be clear and manifest;

otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act." Posadas v. Nat'l City Bank of New York, 296 U.S. 497, 503, 80 L. Ed. 351, 56 S. Ct. 349 (1936);[2] *see also* Branch v. Smith, 538 U.S. 254, 273, 155 L. Ed. 2d 407, 123 S. Ct. 1429 (2003) ("absent a clearly expressed congressional intention . . . repeals by implication are not favored") (internal quotations omitted); Morton v. Mancari, 417 U.S. 535, 551, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974) (same rule). Additionally, as the majority notes, the TVPA itself was codified as part of the Historical and Statutory Notes of the ATCA. *See* Maj. Op. at 12 n.1. This also suggests that the TVPA was meant to augment or elaborate the ATCA, not replace it.

But even assuming this constructional question cannot be resolved by text and canon alone, the legislative history of the TVPA leaves no doubt about the matter. By its terms the ATCA provides jurisdiction over tort suits *brought by aliens only*. After Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), and its progeny made ATCA human rights suits a familiar feature of the federal judicial landscape, Congress enacted the TVPA in 1991 specifically to provide a cause of action *for American nationals* subject to torture or extrajudicial killing in foreign countries. In so doing, Congress cited with approval the *Filartiga* line of cases and stated its intent to augment and expand the ATCA by providing a new cause of action accessible to American victims of brutality abroad. *See* S. Rep. No. 102-249, at 4-5 (1991); H.R. Rep. No. 102-367(I), at 3-4 (1991). In short, Congress did not seek to displace or circumscribe the ATCA, but rather to augment and expand its reach[3]. Congressional Reports on the TVPA state that

The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing .[*28] law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act), which permits Federal district courts to hear claims by aliens for torts committed "in violation of the law of nations." (28 U.S.C. sec. 1350). Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing.

H.R. Rep. No. 102-367(I), at 3 (emphasis added). Turning to the ATCA's ambiguity regarding a cause of action for human rights claims,[4] the House Report continued:

The TVPA would provide such a grant [of an express cause of action], and would also enhance the remedy already available under section 1350 in an important respect: While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad. Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered [by] section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

H.R. Rep No. 102-376(I), at 4. The Senate Report on the TVPA casts the Act in the same light, using

virtually identical language. *See* S. Rep. No. 102-249, at 5.[5] The majority's contention that the TVPA would be "meaningless" if it did not preempt the ATCA is therefore incorrect--the TVPA still serves its purpose of filling a gap in the ATCA's coverage by providing a cause of action for American citizens for certain human rights violations. In this respect the TVPA does not even purport to "occupy the entire field" (as the majority claims) and, as Congress itself made clear, the ATCA was to remain intact to function as before.

The two acts thus are not competing provisions but are meant to be complementary and mutually reinforcing (if somewhat coextensive). Federal courts addressing this specific issue have ruled accordingly, holding that the TVPA does not restrict the scope and coverage of the ATCA. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 241 (2d Cir. 1995) ("The scope of Alien Tort Act remains undiminished by enactment of the Torture Victim Act"); Flores v. S. Peru Copper Corp., 343 F.3d 140, 153 (2d Cir. 2003) (recognizing that "the TVPA reaches conduct that may also be covered by the ATCA"); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 168-69 (5th Cir. 1999) (considering separately claims under the ATCA and TVPA that are "essentially predicated on the same claims of individual human rights abuses"); Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (citing the TVPA as confirmation that the ATCA itself confers a private right of action); Hilao v. Estate of Marcos, 103 F.3d 767, 778-79 (9th Cir. 1996) (noting that the TVPA codifies the cause of action recognized to exist in the ATCA); Wiwa v. Royal Dutch Petroleum Co. et al., 2002 U.S. Dist. LEXIS 3293, 2002 WL 319887 [*32] at *4 (S.D.N.Y. Feb. 28, 2002) (concluding that "plaintiffs' claims under ATCA are not preempted by

the TVPA . . . . the TVPA simply provides an additional basis for assertion of claims for torture and extrajudicial killing"); Doe v. Islamic Salvation Front, 993 F. Supp. 3, 7-9 (D.D.C. 1998) (recognizing simultaneous claims under the ATCA and the TVPA). Indeed to rule otherwise would implicitly undercut more than twenty years of jurisprudence, inaugurated by *Filartiga*, which affirms the ATCA's applicability to human rights suits. The majority has not identified any contrary precedents on this point, and I am not aware of any.

Of course, the Supreme Court addressed the scope of the ATCA quite recently in Sosa v. Alvarez-Machain, 542 U.S. 692, 159 L. Ed. 2d 718, 124 S. Ct. 2739 (2004). The majority incredibly casts the *Sosa* decision as confirming the preclusive effect of the TVPA. *See* Maj. Op. at 14-15. Yet in fact the *Sosa* Court, while cautioning that the set of international norms supporting a cause of action for suits under the ATCA must be construed narrowly, stated that "a clear mandate" for such suits appears in the TVPA. Id. at 2763. Torture [*33] and extra-judicial killing were thus cited as paradigmatic examples of international norms that are sufficiently universal and definite to support claims under the ATCA. It would be decidedly odd--indeed it would be grossly misleading--if the Supreme Court, in making such a declaration, meant to remove these very causes of action from the ambit of the ATCA. The majority, in claiming *Sosa* as authority for the preclusive effect of the TVPA, stands *Sosa* on its head. That case in fact relies on the TVPA as evidence of Congressional acceptance of torture as a norm *enforceable via the ATCA*. There is nothing, express or implied, in *Sosa* to suggest anything about preclusion.

In view of the text of the TVPA itself, the circumstances surrounding its passage, the canons of statutory interpretation discouraging repeals by implication, the legislative history of the Act and prevailing judicial rulings on the subject, it is clear that the TVPA was not intended to preempt or restrict aliens' ability to bring claims for torture and extrajudicial killing under the ATCA. Plaintiffs in the present case should be allowed to bring their claims for these abuses under the ATCA itself, without [*34] resorting to the TVPA.

Exhaustion of Remedies:

This brings us to exhaustion of remedies. As the majority notes, the TVPA contains an exhaustion requirement--in dividuals suing under the TVPA must first exhaust available legal remedies in the place where the alleged misconduct occurred before bringing suit in U.S. court. 28 U.S.C. § 1350, note, § 2(b). Having given preemptive effect to the TVPA, the majority rules that plaintiffs' claims are procedurally barred since they have not demonstrated that they have exhausted their remedies. Maj. Op. at 16. This disposition is problematic for several reasons.

First, since the TVPA does not preclude or preempt actions brought under the ATCA and the common law for torture or extrajudicial killing, it follows that the specific exhaustion requirement of the TVPA does not apply to ATCA actions in the first place. But, to be sure, incorporating an implicit exhaustion requirement in the ATCA would have something to recommend it. Doing so would, among other things, bring the Act into harmony with both the provisions of the TVPA (with

which it is at least partially coextensive) and with the acknowledged tenets of international [*35] law. n6 And while not directly applicable to the ATCA, the TVPA scheme is surely persuasive since it demonstrates that Congress not only assumed that the exhaustion requirements imposed by customary international law were discernible and effective in themselves, but also that they should be reflected in U.S. domestic law.[7] Considerations of equity and consistency also recommend this approach since otherwise American victims of torture would be bound by an exhaustion requirement under the TVPA and foreign plaintiffs could avoid such strictures by pleading under the ATCA.

This question is far from settled, however, and the Supreme Court's decision in *Sosa*, though suggestive, offers little guidance. While it recognizes the possibility of reading an exhaustion requirement into the ATCA, the Court states only that it "would certainly consider this exhaustion requirement in an appropriate case." 124 S. Ct. at 2766, n. 21. Other federal courts appear to be less receptive to the idea. n8 In short, it is far from clear that, purely as a matter of United States jurisprudence, the ATCA contains any exhaustion requirement at all.

However, even assuming that an exhaustion requirement should be read into the ATCA, the majority has placed the evidentiary burden on the wrong party. Under both the TVPA and public international law, it is the *respondent or defendant's* burden to demonstrate that plaintiffs had adequate legal remedies which they did not pursue on the country where the alleged abuses occurred. *See* S.

Rep.No. 102-249, at 10 ("respondent has the burden of raising the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that the claimant did not use."); n9 *accord* Hilao, 103 F.3d at 778 n.5 (quoting S. Rep. No. 102-249, at 9-10); The Velasquez Rodriguez Case, Inter-Am. C.H.R., July 29, 1988, at PP57-61, *available via* http://www.oas.org (citing The American Convention on Human Rights, Nov. 22, 1969, 1114 U.N.T.S. 143, art. 46). Then, *if* the defendant "makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile." S. Rep. No. 102-249 at 10; *accord* The Velasquez Rodriguez [*38] Case, Inter-Am. C.H.R., July 29, 1988, at PP57-61, *available via* http://www.oas.org.

In the present case Abubakar has raised the non-exhaustion defense, but he appears not to have proven the existence of specific remedies that should have been pursued in Nigeria. On this basis alone Abubakar's exhaustion defense must fail. *See* Hilao, 103 F.3d at 778 n.5 (denying defense of exhaustion where defendant had not carried its evidentiary burden under this burden-shifting scheme); *accord* The Velasquez Rodriguez Case, Inter-Am. C.H.R., July 29, 1988, at P60, *available via* http://www.oas.org (state alleging nonexhaustion of remedies must "prove[] the existence of specific domestic remedies that should have been utilized").

But even if General Abubakar were deemed to have made the requisite showing that specific domestic legal remedies exist, plaintiffs' suit should still be allowed to

proceed. Plaintiffs have introduced evidence that they or their relatives were targeted by the Nigerian government as political enemies, and under such circumstances there was obviously nothing to be gained by filing complaints in the Nigerian courts. The facts of life shed some doubt on the majority's airy conclusion that African courtrooms would provide a more hospitable [*40] forum for these claims than those of Chicago. U.S. government sources reveal that from the year 2000, when Abubakar relinquished power, until 2003, when plaintiffs filed the instant suit, the Nigerian judiciary was under-funded, corrupt, subject to political influence and generally unable or unwilling to compensate victims of past human rights abuses. *See* United States Department of State, Nigeria: Country Reports on Human Rights Practices--2003 (February 25, 2004), §§ 1(e), 4; United States Department of State, Nigeria: Country Reports on Human Rights Practices--2000 (February 23, 2001), at §§ 1(e), 4. There can be little doubt but that the legal remedies offered by the Nigerian courts were indeed ineffective, unobtainable, unduly prolonged, inadequate or obviously futile under any applicable exhaustion provisions.

Finally, to the extent that there is any doubt on this issue, both Congress and international tribunals have mandated that such doubts be resolved in favor of the plaintiffs. The Senate Report on the TVPA directs courts to *assume* that the exhaustion requirement has been met. Since "torture victims bring suits in the United States against their alleged torturers [*41] only as a last resort . . . . the initiation of litigation under this legislation will be *virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture*

occurred." S. Rep. No. 102-249, at 9-10 (emphasis added). The Report explicitly states that "courts should approach cases brought under the proposed legislation with this assumption" and reminds us that "the ultimate burden of proof and persuasion on the issue of exhaustion of remedies . . . lies with the *defendant*." Id. at 10 (emphasis added); *accord* The Velasquez Rodriguez Case, Inter-Am. C.H.R., July 29, 1988, at P59, *available via* http://www.oas.org ("the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective") (quotation marks omitted).

Immunity

Thus, even if an exhaustion requirement is read into the ATCA, the majority should have proceeded to the merits of the immunity issue rather than remand the case for consideration of pleading and exhaustion questions. As to the immunity issue itself, the district court concluded that the Foreign Sovereign Immunities Act [*42] (FSIA) does not apply to individuals, and the majority opinion appears to agree, holding that General Abubakar receives no protection from the Act. *See* Maj. Op. at 9; *cf.* Ye v. Zemin, 383 F.3d 620, 625 (7th Cir. 2004) ("The FSIA does not . . . address the immunity of foreign heads of states. The FSIA refers to foreign states, not their leaders.").

Of course, the majority of courts of appeals disagree, holding that the FSIA affords immunity to individual foreign officials for legally authorized acts taken in their official capacity. *See* Velasco v. Indonesia, 370 F.3d 392, 398 (4th Cir. 2004) ("courts have construed foreign sovereign immunity to extend to an individual

acting in his official capacity on behalf of a foreign state"); Park v. Shin, 313 F.3d 1138, 1144 (9th Cir. 2002) ("Individual government employees may be considered 'foreign states' within the meaning of the FSIA."); Keller v. Central Bank of Nigeria, 277 F.3d 811, 815 (6th Cir. 2002) ("normally foreign sovereign immunity extends to individuals acting in their official capacities as officers of corporations considered foreign sovereigns."); Byrd v. Corporacion Forestal Y Industrial De Olancho S.A., 182 F.3d 380, 388 (5th Cir. 1999) [*43] ("Normally, the FSIA extends to protect individuals acting within their official capacity as officers of corporations considered foreign sovereigns."); El-Fadl v. Central Bank of Jordan, 316 U.S. App. D.C. 86, 75 F.3d 668, 671 (D.C. Cir. 1996) ("An individual can qualify as an 'agency or instrumentality of a foreign state' " when acting in his official capacity on behalf of the state.); Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990) (Concluding that the FSIA "can fairly be read to include individual sued in their official capacity.").

Affording immunity to foreign officials for legally authorized acts may be more consonant with the tenets of current international law n10--not to mention this country's own law on immunities for domestic officials n11 --yet under either approach the end result is the same since, even under the more liberal interpretation advanced by the majority of the circuits, officials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts). *See, e.g.*, Chuidian, 912 F.2d at 1106 ("Sovereign immunity [*44] . . . will not shield an official who acts beyond the scope of his authority."); Hilao v. Estate of Marcos, 25 F.3d 1467, 1472 (9th Cir.

1994) ("acts of torture, execution, and disappearance were clearly acts outside of his authority as President . . . . Marcos' acts were not taken within any official mandate and were therefore not the acts of an agency or instrumentality of a foreign state within the meaning of FSIA.") (citing Chuidian, 912 F.3d at 1106); Trajano v. Marcos, 978 F.2d 493 (9th Cir. 1992) (same rule). General Abubakar is therefore not entitled to immunity in any event. n12

Conclusion

For the foregoing reasons, I would affirm the ruling of the district court and allow this case to proceed.

n1 This provision has also been referred to as the "Alien Tort Act," *see, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995), and the "Alien Tort Statute," *see, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

n2 The Court elaborates on this principle as follows: "There are two well-settled categories of repeals by implication: (1) Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment." Posadas, 296 U.S. at 503.

n3 As at least one court of appeals has also noted, whereas the ATCA speaks only in terms of the *jurisdiction* of U.S. courts to hear alien tort claims, the TVPA went one step further to create *liability* for acts of torture and extrajudicial killing under U.S. law. *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 104-05 (2d Cir. 2000). [*30]

n4 On this score the Report is responding in particular to the concerns raised by Judge Bork in his concurring opinion in Tel-Oren v. Libyan Arab Republic, 233 U.S. App. D.C. 384, 726 F.2d 774 (D.C. Cir. 1984). The Report cites Judge Bork's opinion specifically. *See* H.R. Rep. No. 102-367(I), at 4.

n5 Addressing these same issues, the Senate Report states:

The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 of title 28 of the U.S. Code, derived from the Judiciary Act of 1789 (the Alien Tort Claims Act). The TVPA would provide such a grant [of a cause of action], and would also enhance the remedy already available under section 1350 in an important respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad. Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately

be covered by section 1350. Consequently, that statute should remain intact.

S. Rep. No. 102-249 at 4-5 (footnote omitted).

n6 Exhaustion of remedies requirements are a well-established feature of international human rights law. *See, e.g.*, I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 472-81, 552 (6th ed. 2003); The American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 143, art. 46; The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, art. 26; The Velasquez Rodriguez Case, Inter-Am. C.H.R., July 29, 1988, at PP50-73, *available via* http://www.oas.org. Certainly in applying a statute like the ATCA, where liability is predicated on "violation of the law of nations," it would seem natural to honor the basic tenets of public international law. It is also well-established that, as a general proposition, U.S. law should incorporate and comport with international law where appropriate. *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 124 S. Ct. 2359, 2366, 159 L. Ed. 2d 226 (2004) (Courts must assume that Congress seeks to comply with customary international law); The Paquete Habana, 175 U.S. 677, 700, 44 L. Ed. 320, 20 S. Ct. 290 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."); Murray v. Schooner Charming Betsy, 6 U.S. 64, 2 Cranch 64, 2 L. Ed. 208 (1804) ("An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"). [*36]

n7 The TVPA's legislative history reveals that its exhaustion provisions are expressly modeled on those of customary international law, and it sets forth the parameters of the exhaustion analysis with striking clarity. *See* S. Rep. No. 102-249, at 9-10.

n8 Apparently no court of appeals has confronted the issue squarely, though the Second Circuit's decision in *Kadic v. Karadzic* at least implicitly did so by ostensibly declining to impose an exhaustion requirement on claims for torture and summary execution, even though it was also considering TVPA claims based on the same alleged abuses. 70 F.3d at 241-44. Several federal district courts have made more express rulings to this effect. See Doe v. Rafael Saravia, 348 F. Supp. 2d 1112, 1157 (E.D. Cal. 2004) ("Plaintiffs asserting claims under the ATCA are not required to exhaust their remedies in the state in which the alleged violations of customary international law occurred."); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1133 (C.D. Cal. 2002) ("The court is not persuaded that Congress' decision to include an exhaustion of remedies provision in the TVPA indicates that a parallel requirement must be read into the ATCA.") (citing Kadic, 70 F.3d at 241); Jama v. I.N.S., 22 F. Supp. 2d 353, 364 (D.N.J. 1998) ("There is nothing in the ATCA which limits its application to situations where there is no relief available under domestic law.").

n9 The Senate Report on the Torture Victim Protection Act is quite clear on both the specifics of the exhaustion of remedies analysis and its basis in international law:
Cases involving torture abroad which have been filed under the Alien Tort Claims Act show that torture victims bring suits in the United States against their

alleged torturers only as a last resort. Usually, the alleged torturer has more substantial assets outside the United States and the jurisdictional nexus is easier to prove outside the United States. Therefore, as a general matter, the committee recognizes that in most instances the initiation of litigation under this legislation will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred. The committee believes that courts should approach cases brought under the proposed legislation with this assumption.

More specifically, as this legislation involves international matters and judgments regarding the adequacy of procedures in foreign courts, the interpretation of section 2(b), like the other provisions of this act, should be informed by general principles of international law. The procedural practice of international human rights tribunals generally holds that the respondent has the burden of raising the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that the claimant did not use. Once the defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile. The ultimate burden of proof and persuasion on the issue of exhaustion of remedies, however, lies with the defendant.

This practice is generally consistent with common-law principles of exhaustion as applied by courts in the United States. See, e.g., Honig v. Doe, 484 U.S. 305,

325-29, 98 L. Ed. 2d 686, 108 S. Ct. 592 (1988) (allowing plaintiffs to by-pass administrative process where exhaustion would be futile or inadequate).

. . . .

As in the international law context, courts in the United States do not require exhaustion in a foreign forum when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile.

S. Rep. No. 102-249, at 9-10 (footnotes omitted).

n10 *See Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others*, Ex Parte Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (1999) (appeal taken from Q.B.) (ruling that a former head of state enjoys immunity for legally authorized acts taken in his official capacity, but not for acts, such as torture, committed in violation of *jus cogens* international norms); Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), I.C.J., February 14, 2002, at P61, *available at* http://www.icj-cij.org (confirming that national courts may try former foreign officials for acts committed in their private capacities). [*45]

n11 *See, e.g.*, Monell v. Dept. of Soc. Svcs., 436 U.S. 658, 690 n.55, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).

n12 The foreign policy implications of the immunity question are intensified where a sitting or former foreign head of state is involved. Fortunately, the question of General Abubakar's immunity for acts taken as Nigeria's head of state is not before us--General Abubakar has appealed the district court's

denial of immunity only for acts taken as a member of the Nigerian Provisional Ruling Council.

Case No. 02 C 6093

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

HAFSAT ABIOLA, individually and on behalf of the Estates of M.K.O. ABIOLA and ALHAJA KUDIRAT ABIOLA, ANTHONY ENAHORO, and ARTHUR NWANKWO, Plaintiffs, vs. GEN. ABDUSALAMI ABUBAKAR, Defendant.

June 17, 2003, Decided
June 23, 2003, Docketed

COUNSEL: For GANI FAWEHINMI, ANTHONY ENAHORO, ARTHUR NWANKWO, FEMI ABORISADE, OWENS WIWA, HAFSAT ABIOLA, C D C. D. DOE, plaintiffs: Kayode O Oladele, Angustine Agomuoh, The Justice Center, Detroit, MI.

For ABDUSALAMII ABUBAKAR, defendant: Kevin Brian Duckworth, Katherine Smith Dedrick, Jennifer Lundy Sender, Stephanie R. Gaines, Hinshaw & Culbertson, Chicago, IL.

For ABDUSALAMII ABUBAKAR, defendant: Ephraim C Ugwuonye, ECU Assoc., Rockville, MD.

JUDGES: MATTHEW F. KENNELLY, United States District Judge.

OPINIONBY: MATTHEW F. KENNELLY

OPINION:

[*907] MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Plaintiffs are Nigerian nationals who, their complaint alleges, suffered grave human [*908] rights abuses at the hands of Nigeria's military regime. Defendant, General Abdusalami Abubakar, was a member of the military junta that ruled Nigeria from November 1993 [**2] to May 1999 and was Nigeria's head of state for approximately the last year of the junta's reign. Plaintiffs contend that Abubakar caused others to carry out the atrocities.

Plaintiffs contend that the Court has jurisdiction of the case under *28 U.S.C. § 1331, § 1350*, and the doctrine of pendent jurisdiction. They allege violations of customary international law, various international conventions and treaties, Nigerian law, and common law false imprisonment, assault and battery, intentional infliction of emotional distress, conversion, and wrongful death. The case is before the Court on Abubakar's motion for summary judgment. He asserts lack of subject matter jurisdiction, lack of personal jurisdiction, and *forum non conveniens* and challenges plaintiff Abiola's standing to bring this suit. For the reasons stated below, Abubakar's motion is granted in part, denied in part, and deferred in part.

BACKGROUND n1

[**3]

On December 31, 1983, General Muhammed Buhari staged a military coup that overthrew Nigeria's democratically elected president and set off a series of

military coups, forced abdications, and broken promises of a return to civilian rule. A parade of military rulers followed: in 1985, General Ibrahim Babangida overthrew General Buhari; after Babangida's ouster in August 1993, a civilian, Ernest Shonekan, led an interim military government; General Sani Abacha seized power three months later; and upon Abacha's sudden death, defendant Abubakar assumed control of the military regime on June 8, 1998. Unlike his predecessors, Abubakar carried out the long-promised transition to civilian government. A presidential election was held, and on May 29, 1999, former general Olusegun Obasanjo became Nigeria's first elected, civilian president in fifteen years.

Under the various military regimes between 1983 and 1999, the highest governmental body was the Provisional Ruling Council (PRC). n2 The PRC was composed of military officials and some civilians, and its chairmanship resided in whoever was currently the military leader. This body exercised both legislative and executive authority as well [**4] as judicial oversight. According to the complaint, the PRC ruled by decree, abolished democratic institutions, severely curtailed civil liberties, and insulated its actions from judicial review.

Before his ascension to head of state, Abubakar was appointed the Chief of Defense Staff by General Babangida. In this role, Abubakar was a member of the PRC and a high ranking member of the military junta. The complaint alleges that between 1993 and 1998, Abubakar occupied the third highest military and political position in Nigeria. When he assumed power in 1998, he became head of state, Commander in Chief of the Nigerian armed forces, and Chairman of the PRC.

Plaintiff Hafsat Abiola is the daughter of Nigerian pro-democracy activists; she alleges that [**5] Abubakar is responsible for [*909] their deaths. On June 12, 1993, the Babangida regime held a presidential election as part of a promised return to civilian government. Abiola's father, M.K.O. Abiola, was a candidate in the election. Plaintiff contends that early returns showed that Abiola won the election, but the military regime nullified the election without releasing the official results. This led to protests and violent clashes between military forces and civilians. Abiola himself unsuccessfully challenged the election's nullification through the Nigerian court system and sought Nigerian and international support for the recognition of the election and its results. In June 1994 -- during General Abacha's rule -- Abiola declared himself the President of Nigeria. D.'s Br. in Support of Mot. for Summ. J. at 2. In August 1994, Abiola was arrested and charged with treason. Plaintiff alleges that while in prison, Abiola was kept under inhumane conditions, tortured, and denied access to lawyers, doctors, and family. He remained in prison until his death on July 9, 1998, roughly one month after defendant Abubakar had assumed control of the military regime. Plaintiff contends that her father [**6] died in Abubakar's executive offices, where he had been taken for a meeting, and that he "slumped and died . . . immediately after taking the tea prepared for him by one of Defendant Abubakar's aides." Am. Compl. P 23.

Plaintiff Abiola's mother, Alhaja Kudirat Abiola, was also a pro-democracy activist. After her husband's imprisonment, she embarked on a vocal campaign to free her husband and continued to call for the democratization of Nigeria. Plaintiff contends that

Kudirat -- and the international attention she attracted -- infuriated the military regime. She allegedly received several menacing telephone calls warning her to refrain from criticizing the government. In June 1996, Kudirat was gunned down in her car. The complaint alleges that since the democratization of Nigeria in May 1999, her mother's killers have been arrested and confessed to carrying out the hit on orders of the PRC. The confessed killers and some members of the PRC have been charged with Kudirat's murder and are currently being tried. D.'s Br. in Support of Mot. for Summ. J. at 3 n.4.

Plaintiff Anthony Enahoro's political activism dates back to Nigeria's independence from Great Britain in 1960, in which he [**7] played a leading role. A former member of Nigeria's parliament, he more recently founded pro-democracy grass-roots organizations and spearheaded civil resistance to the military dictatorship. In August 1994, he was arrested and imprisoned. Under international pressure to free the seventy-year old man, he was released in December 1994. His four month detention was marked by harsh treatment. A diabetic, he was not provided insulin or offered any medical treatment. Following his release, Enahoro was granted political asylum by the United States, where he resided from 1995 until 2000, when he returned to Nigeria.

Plaintiff Arthur Nwankwo is a scholar and political activist who was arrested on June 3, 1998. The complaint alleges that upon his arrest, Nwankwo was stripped naked, flogged with a cane, and carried away in a car trunk. The conditions of his confinement were severe; he was tortured and not permitted any clothes

or covers. He was denied access to family, doctors, or legal counsel. He was released on August 24, 1998.

DISCUSSION

A. Subject Matter Jurisdiction

Abubakar maintains that this Court cannot exercise subject matter jurisdiction over this case because [**8] plaintiffs have not complied with certain statutory requirements [*910] and because he is entitled to immunity under the *Foreign Sovereign Immunities Act* or as a head of state.

1. Torture Victim Protection Act

Plaintiffs' claims are brought pursuant to the alien Tort Claims Act, *28 U.S.C. § 1350*. Abubakar asserts that this Court lacks subject matter jurisdiction because plaintiffs have failed to comply with the exhaustion-of-remedies requirement of the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), codified at *28 U.S.C. § 1350* note. Although plaintiffs have not asserted a claim under the TVPA, Abubakar argues that the statute operates to bar our jurisdiction because, he contends, the TVPA governs "the extent of subject matter jurisdiction over foreign tortfeasors." D.'s Br. in Support of Mot. for Summ. J. at 4.

The TVPA creates liability under United States law where, under color of law "of any foreign nation," an alien or United States citizen is subject to torture or extrajudicial killing. *28 U.S.C. § 1350* note § 2(a). The TVPA requires that a plaintiff first exhaust "adequate [**9] and available remedies in the place in which the conduct occurred." *Id.* § 2(b). Abubakar contests this Court's jurisdiction because plaintiffs have an adequate

forum in Nigerian courts and have not shown that they have exhausted their Nigerian remedies.

The first problem with Abubakar's argument is that the TVPA is not a jurisdictional statute, such that failure to comply with its requirements strips the Court of jurisdiction. *Cf. Al Odah v. United States, 321 F.3d 1134, 1146 (D.C. Cir. 2003)* ("*The Torture Victim Act* does not contain its own jurisdictional provision."). Rather, the statute simply provides a cause of action for torture and extrajudicial killings. H.R. Rep. No. 102-367, pt. 1, at 3 (1991). The TVPA does not supplant other causes of action that can be brought under the ATCA's jurisdictional umbrella. *Id.* at 4 ("Claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by *section 1350* [the ATCA]. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.").

Plaintiffs have brought this [**10] action pursuant to the ATCA, which confers federal jurisdiction for an action brought by an alien, for a tort, committed in violation of international law or a treaty to which the United States is a party. *28 U.S.C. § 1350*; *see Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995)*. An alien plaintiff basing federal jurisdiction on the ATCA need not also assert a claim under, or comply with the terms of, the TVPA -- all that is required is that she allege a tort committed in violation of international law, as plaintiffs here have done. In sum, because plaintiffs have not alleged a TVPA claim, the TVPA's exhaustion requirement does not apply.

2. Foreign Sovereign Immunity

Abubakar claims that, as Nigeria's former head of state, he is entitled to immunity from suit under the Foreign Sovereign Immunities Act of 1976 (FSIA), *28 U.S.C § 1602 et seq.* If Abubakar is shielded by foreign sovereign immunity, this Court lacks subject matter jurisdiction and must dismiss the claims against him: "the absence of sovereign immunity is a prerequisite to subject matter jurisdiction . . . ." *Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985).* [**11]

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," unless certain exceptions apply. *28 U.S.C. § 1604.* Though the FSIA [*911] is "the sole basis for obtaining jurisdiction over a foreign state," *Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989),* the Act makes no mention of any immunity afforded to individuals. Abubakar maintains that it is well established that the FSIA applies to foreign officials and thus to heads of state who are sued for acts committed in their official capacities. This proposition, however, is far from settled. *See, e.g., In re Doe, 860 F.2d 40, 45 (2d Cir. 1988)* ("Because the FSIA makes no mention of heads-of-state, their legal status remains uncertain."); *Tachiona v. Mugabe, 169 F. Supp. 2d 259, 293-94 (S.D.N.Y. 2001)* ("The substantial disarray and division in the courts' practice following the enactment of the FSIA still prevails regrading the treatment accorded to head-of-state immunity . . . ."). In fact, courts divide on the question whether the FSIA's [**12] provisions cover heads of state. *See, e.g., id.* ("While there is significant opinion supporting the interpretation [that the FSIA's definition of "foreign

state" extends to individuals], some courts addressing the exact question have squarely ruled otherwise, so that the proposition is by no means entirely settled.").

Under traditional common law, a foreign head of state was absolutely immune from suit in United States courts. The Supreme Court articulated this principle of customary international law in its 1812 decision, *The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 3 L. Ed. 287 (1812).* Although *The Schooner Exchange* held merely that an armed ship of a friendly foreign state was exempt from the jurisdiction of United States courts, the decision "came to be regarded as extending virtually absolute immunity to foreign sovereigns." *Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486, 76 L. Ed. 2d 81, 103 S. Ct. 1962 (1983).* Sovereign immunity was premised on the notions of comity and the equal dignity of nations. A ruler could not be seen to "degrade the dignity of his nation by placing himself or its sovereign rights [**13] within the jurisdiction of another." *The Schooner Exchange, 11 U.S. (7 Cranch) at 137.* A head of state's immunity was premised on the concept that a foreign state and its ruler were one and the same; the "prince" was deemed to be the personification of the sovereign state. *The Schooner Exchange* reflects this conflation; throughout the opinion Chief Justice Marshall makes no distinction between the sovereign as state and the sovereign as ruler.

The conceptual identity of ruler and state "translated into a principle of immunity that, under customary international law, developed and was recognized as similarly unitary and coextensive." *Tachiona, 169 F. Supp. 2d at 269.* The result was that head-of-state immunity was not considered a concept

distinct from the sovereign immunity of a foreign state. This identity is reflected in the absolute dearth of pre-1976 cases in which jurisdiction was asserted over a head of state personally, "separate and apart from the sovereign state the leader personified." *Id. at 270* & n.29 (citing sources).

As the principles articulated in *The Schooner Exchange* evolved into a general doctrine of foreign [**14] sovereign immunity, the courts consistently "deferred to the decisions of the political branches -- in particular, those of the Executive Branch -- on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden, 461 U.S. at 486.* The Supreme Court articulated the rationale for such deference:

> It is a guiding principle in determining whether a court should exercise or surrender its jurisdiction . . ., that the [*912] courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. "In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.

Republic of Mexico v. Hoffman, 324 U.S. 30, 35, 89 L. Ed. 729, 65 S. Ct. 530 (1945) (quoting *United States v.*

Lee, 106 U.S. 196, 209, 27 L. Ed. 171, 1 S. Ct. 240 (1882)). Thus emerged a system under which the [**15] State Department determined the availability of sovereign immunity and the courts deferred to its decisions. *Verlinden, 461 U.S. at 487.*

Until 1952, the State Department "ordinarily requested immunity in all actions against friendly foreign sovereigns." *Id. at 486.* Then in 1952, the absolute form of immunity articulated in *The Schooner Exchange* was modified in the so-called Tate Letter. Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in Alfred Dunhill v. Republic of Cuba, 425 U.S. 682, 48 L. Ed. 2d 301, 96 S. Ct. 1854 (1976).* The Tate Letter announced the State Department's adoption of the "restrictive" theory of foreign sovereign immunity. Under this theory, the State Department would recognize immunity only for a foreign sovereign's public acts, not its commercial or private activities. The Tate Letter explained that this shift in policy was motivated by the increasing practice of governments to engage in commercial activities, which made necessary "a practice which will enable persons doing business with [state enterprises] to have [**16] their rights determined in the courts." *Id.* The Tate Letter did not mention how immunity for heads of state would be altered, if at all. Notably, after the Tate Letter, courts continued to give conclusive deference to the State Department's determinations, issued in the form of "suggestions of immunity."

The practical application of the restrictive theory proved troublesome, however. *Verlinden, 461 U.S. at 487.* Foreign states faced with litigation in United

States courts often exerted diplomatic pressure on the State Department, and "on occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory." *Id.* Diplomatic pressures led to inconsistent, and sometimes embarrassing, outcomes. Equally problematic was that when the State Department did not intervene to request immunity, courts were left without objective rules for determining whether a state's assertion of immunity should be honored. Sovereign immunity determinations were thus "made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing [**17] standards were neither clear nor uniformly applied." *Id. at 488.*

In 1976, Congress passed the FSIA to "free the Government from case-by-case diplomatic pressures, to clarify the governing standards, and to 'assure litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'" *Id. at 488* (quoting H.R. Rep. No. 94-1487, at 7 (1976) (hereinafter H.R. Rep.)) (alterations in original). The FSIA did so by codifying the restrictive theory and transferring immunity determinations [*913] based on the public/commercial distinction from the State Department to the courts. *See 28 U.S.C. § 1602* (findings and declaration of purpose).

Neither the FSIA's text nor its legislative history addresses the issue of head-of-state immunity. Rather, like the Tate Letter, the FSIA manifests a preoccupation with the commercial activities of foreign states and a concern with granting "access to the courts in order to resolve ordinary legal disputes" that arise

from their business transactions. H.R. Rep. at 6; *id.* at 7 ("In a modern world where foreign state enterprises are every day participants in commercial [**18] activities, [the FSIA] is urgently needed legislation."); *Lafontant v. Aristide, 844 F. Supp. 128, 137 (E.D.N.Y. 1994)* ("[The FSIA] was crafted primarily to allow state-owned companies, which had proliferated in the communist world and in the developing countries, to be sued in United States courts in connection with their commercial activities."). In this vein, the Act's "Findings and declaration of purpose" states that

> under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1602. The FSIA provides that a "foreign *state*" is immune unless certain exceptions apply. *Id. § 1604* (emphasis added). For example, the commercial exception provides that immunity is unavailable in actions

> based upon [**19] a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a

> commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Id. § 1605(a)(2).

The FSIA's definition of "foreign state" noticeably omits heads of state. "Foreign state" is defined to include an "agency or instrumentality of a foreign state," which is further defined as "any *entity* (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." *Id. § 1603(b)* (emphasis added). The House Report's discussion of the definition of "foreign state" further underscores both the Act's commercial purpose as well as its applications to states *qua* states and state entities, not heads of state. The FSIA's reference to a foreign state's "agency or instrumentality" [**20] is meant to cover

> a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

H.R. Rep. at 16. Although the term "foreign state" is thus to be read broadly enough to cover such entities,

there is no indication that heads of state are to be included in the definition. In fact, references in the legislative history [*914] suggest that the opposite is true. During Congressional deliberations on the FSIA, a witness from the Department of Justice described how the proposed legislation would enable suits against foreign state-owned enterprises -- such as Lufthansa, West Germany's national airline. Notably, however, he emphasized, "Now we are not talking, Congressmen, in terms of permitting suit against the Chancellor of the Federal Republic. . . . That is an altogether different question." Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong. 16 (1976) (statement of Bruno [**21] Ristau, Chief, Foreign Litigation Unit, Civil Division, Department of Justice). Moreover, although the FSIA does not mention head-of-state immunity, the Act's legislative history indicates that it was not meant to affect diplomatic or consular immunity: "*Section 1605(a)(5)* would not govern suits against diplomatic or consular representatives but only suits against the foreign state." H.R. Rep. at 21.

It is logical to infer from the FSIA's legislative history and the omission of head of state from the definition of "foreign state" that the FSIA was not intended to alter traditional immunity for heads of state. *See Tachiona, 169 F. Supp. 2d at 277* ("With a legislative record devoid of any explicit contrary expression, a deliberate purpose to depart from generally prevalent international customs and practices as regards immunity for heads-of-state should not be ascribed to Congress."). This conclusion is further supported by the dearth of pre-FSIA cases dealing

with head-of-state immunity; because -- unlike foreign state immunity -- the issue did not come up in litigation, it seems unlikely that Congress saw the need or intended to codify a rule for head-of-state immunity. [**22] *See id.* ("It . . . would be an overstatement to say that Congress could have envisioned legislating to address a situation whose inherent problems, complexities and exact dimensions were not known or fully comprehended at the time."). n3

[**23]

Because the FSIA does not apply to heads of state, the pre-1976 suggestion of immunity procedure survives the statute's enactment with respect to heads of state. In reaching this determination, we join several courts who have come to this conclusion. *See United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997)* ("Because the FSIA addresses neither head-of-state immunity, nor foreign sovereign immunity [*915] in the criminal context, head-of-state immunity could attach in cases, such as this one, only pursuant to the principles and procedures outlines in *The Schooner Exchange* and its progeny. As a result, this court must look to the Executive Branch for direction on the propriety of Noriega's immunity claim."); *Leutwyler v. Office of her Majesty Queen Rania Al-Abdullah, 184 F. Supp. 2d 277, 280 (S.D.N.Y. 2001)* (not applying the FSIA to Queen Rania and dismissing all claims against her because the Government filed a *Suggestion of Immunity); Tachiona, 169 F. Supp. 2d at 290* ("The Executive Branch's role in determinations of head-of-state immunity was not affected by the passage of the FSIA."); *First Am. Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1119 (D.D.C. 1996)* [**24] ("The enactment of

the FSIA was not intended to affect the power of the State Department . . . to assert immunity for heads of state or for diplomatic and consular personnel."); *Lafontant, 844 F. Supp. at 137* ("The language and legislative history of the FSIA, as well as case law, support the proposition that the pre-1976 suggestion of immunity procedure survives the FSIA with respect to heads-of-state."); *Alicog v. Kingdom of Saudi Arabia, 860 F. Supp. 379, 382 (S.D. Tex. 1994)* (dismissing claims against King Fahd because the United States intervened to acknowledge his status as head of state), *aff'd, 79 F.3d 1145 (5th Cir. 1996)* (unpublished table decision); *Kline v. Kaneko, 141 Misc. 2d 787, 535 N.Y.S.2d 303, 304 (N.Y. Sup. Ct. 1988)* ("The FSIA made no change . . . in the State Department's power to suggest immunity for foreign heads of state. . . ."; dismissing suit against wife of Mexican president because State Department suggested immunity). *See also Kadic, 70 F.3d at 248* (declining to extend head-of-state immunity to defendant where the Executive Branch refused to acknowledge immunity).

The [**25] Court acknowledges the line of cases cited by Abubakar, largely from the Ninth Circuit, that have found that the FSIA abrogated the pre-1976 approach to immunity for heads of state. In *Chuidian v. Philippine National Bank, 912 F.2d 1095 (9th Cir. 1990)*, the Ninth Circuit held that the FSIA's definition of "agency or instrumentality" can "fairly be read to include individuals sued in their official capacity." *Id. at 1103*. Yet even some court decisions that, following *Chuidian*, apply the FSIA to determine whether a foreign official is entitled to immunity nevertheless defer to the State Department's suggestions where a head of state is concerned. *See, e.g., First Am. Corp.,*

948 F. Supp. 1107; *Leutwyler, 184 F. Supp. 2d 277.* Defendant also cites *Boshnjaku v. Federal Republic of Yugoslavia, 2002 U.S. Dist. LEXIS 13763, No. 01 C 4608, 2002 WL 1575067 (N.D. Ill. July 18, 2002)*, a decision by this Court, in which we held (relying on *Chuidian*) that a former head of state qualified as an "agency or instrumentality of a foreign state" and was therefore immune under the FSIA. Upon reconsideration of the issue and for the reasons [**26] stated above, however, the Court concludes that the FSIA does not apply to heads of state.

We therefore turn to a determination of whether Abubakar is entitled to immunity from this lawsuit. Because the FSIA did not alter head-of-state immunity, common law immunity -- and the practice of following the State Department's immunity determinations -- remains intact with respect to heads of state. The State Department, however, has not intervened to suggest immunity for Abubakar. In the absence of guidance from the Executive Branch, "courts may decide for themselves whether all the requisites of immunity exist." *Republic of Mexico, 324 U.S. at 34-35*; *Noriega, 117 F.3d at 1212*; *In re Doe, 860 F.2d at 45.*

[*916] At common law, heads of state enjoyed absolute immunity from all suits, except perhaps those arising from a head of state's personal commercial ventures. *Cf. The Schooner Exchange, 11 U.S. (7 Cranch) at 145* (suggesting that a head of state involved in a private venture might not enjoy immunity). And even were the Tate Letter deemed to apply to heads of state, its restrictions would not apply in this case, as the plaintiffs' [**27] claims do not arise from Abubakar's business transactions. Plaintiffs contend that the nature of the wrongs they allege

eliminates any immunity that might otherwise shield Abubakar. However, the opposite seems to be true. First, as just mentioned, under the common law heads of state enjoyed absolute immunity from suit, regardless of the nature of the allegations. Second, as discussed above, foreign sovereign immunity and head of state immunity were not conceptually distinct doctrines until the FSIA carved out certain immunity exceptions for foreign states. A head of state, like the state itself, can therefore be understood to enjoy any immunity that states retain after the FSIA's enactment. The Supreme Court has held that foreign states are immune from suits for unlawful detention and torture -- "abuse of the power of [a state's] police" -- because "however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature." *Saudi Arabia v. Nelson, 507 U.S. 349, 361, 123 L. Ed. 2d 47, 113 S. Ct. 1471 (1993). A fortiori*, the same is true [**28] for a head of state.

Plaintiffs also argue that Abubakar should not be immune because head-of-state immunity only protects sitting heads of state. The immunity to be afforded a former head of state is an unsettled issue; there is no square holding that head-of-state immunity for acts committed during one's tenure as ruler disappears when a leader steps down. The Second Circuit has stated in dicta that "there is respectable authority for denying head-of-state immunity to former heads-of-state." *In re Doe, 860 F.2d at 45*. However, the cases the court cited in support of this proposition suggest merely that a former head of state may not be entitled to immunity 1) for his private acts, *see The Schooner*

Exchange, 11 U.S. (7 Cranch) at 145; Republic of Philippines v. Marcos, 806 F.2d 344, 360 (2d Cir. 1986) (stating in dicta that head-of-state immunity may not "go[] so far as to render a former head of state immune as regards his *private* acts" (emphasis added)), or 2) when the foreign state waives the immunity of its former leader, *see In re Grand Jury Proceedings, 817 F.2d 1108, 1111 (4th Cir. 1987)*. Neither scenario [**29] is present here. Moreover, the cornerstones of foreign sovereign immunity, comity and the mutual dignity of nations, are not implicated by denying immunity in the types of matters cited in *Doe* -- in the first scenario because the head of state is being sued for acts taken as a private person and in the second because the foreign state disavows immunity for its former leader. In this Court's estimation, the rationale for head-of-state immunity is no less implicated when a former head of state is sued in a United States court for acts committed while head of state than it is when a sitting head of state is sued.

In the absence of any doctrine restricting a head of state's immunity for the type of conduct alleged in the complaint or a denial of immunity from the State Department, the Court determines that Abubakar is entitled to head-of-state immunity for his acts during the period that he was Nigeria's head of state. Abubakar asserts, and plaintiffs concede, that he was Nigeria's head of state from June 8, 1998 to [*917] May 29, 1999. He is immune from suit only for acts committed during that period. *See, e.g., Tachiona, 169 F. Supp. 2d at 289* ("Courts uniformly have accepted [**30] the claim [of immunity] as to heads-of-state and heads-of-government."); *El-Hadad v. Embassy of the United Arab Emirates, 69 F. Supp. 2d 69, 82 n. 10*

(D.D.C. 1999) (declining to extend head-of-state immunity "to cover all agents of the head of state"), *rev'd in part on other grounds, 342 U.S. App. D.C. 138, 216 F.3d 29 (D.C. Cir. 2000)*; *First American Corp. v. Al-Nahyan, 948 F. Supp. 1107 (D.D.C. 1996)* (declining to recognize head of state immunity of *Minister of Defense of the United Arab Emirates)*; *Republic of Philippines v. Marcos, 665 F. Supp. 793, 797 (N.D. Cal. 1987)* (stating that the "two traditional bases for a recognition or grant of head-of-state immunity" are a defendant's position as either sovereign or foreign minister). We therefore turn to the complaint to determine if immunity is available with respect to each plaintiff's allegations.

M.K.O. Abiola was imprisoned in June 1994 and died on July 9, 1998. Abubakar is entitled to immunity only for any acts committed during the last month of M.K.O.'s life, the period when he was Nigeria's head of state. Plaintiff Abiola's claims are dismissed for lack of subject matter jurisdiction [**31] to the extent they arise from M.K.O. Abiola's treatment between June 8, 1998 and July 9, 1998. Defendant's motion as to Abiola's claims concerning her father is otherwise denied.

With respect to plaintiff Abiola's claims arising from the murder of her mother, Alhaja Kudirat Abiola, Abubakar is not entitled to immunity because the murder occurred in June 1996, two years before he became head of state. Similarly, Abubakar lacks immunity with regard to plaintiff Enahoro's claims, which arise from his imprisonment in 1994.

Plaintiff Nwankwo's claims arise from his imprisonment between June 3, 1998 and August 24, 1998. Apart from the five days he was held before

Abubakar's ascension to power, Nwankwo's claims fall squarely during Abubakar's tenure as head of state. Abubakar is entitled to immunity with respect to Nwankwo's claims arising from Abubakar's acts between June 8, 1998 and August 24, 1998.

B. Personal Jurisdiction

Abubakar maintains that this Court cannot exercise personal jurisdiction over him. Although he was personally served with summons while visiting Chicago, he argues that he does not have the required minimum contacts with the forum to render this Court's [**32] jurisdiction consistent with traditional notions of fair play and substantial justice. *See Int'l Shoe Co. v. Washington, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945); Shaffer v. Heitner, 433 U.S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977). But see Burnham v. Superior Court, 495 U.S. 604, 619, 109 L. Ed. 2d 631, 110 S. Ct. 2105* (plurality opinion) ("Jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"). However, as this Court has stated in a previous order, *see* Order of Jan. 7, 2003, Abubakar waived any defect in personal jurisdiction by answering the complaint without challenging personal jurisdiction by way of an affirmative defense or a *Rule 12(b)* motion. *Fed. R. Civ. P. 12(h)(1)(B)* ("A defense of lack of jurisdiction over the person . . . is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading . . . .); *Fed. R. Civ. P. 12(b)* ("A motion making any of these defenses [including lack of personal [**33] jurisdiction] shall be made before pleading if a further

pleading [*918] is permitted."); *Linc Fin. Corp. v. Onwuteaka, 129 F.3d 917, 921 (7th Cir. 1997).*

C. *Forum non Conveniens*

Abubakar argues that this action should be dismissed on the grounds of *forum non conveniens.* Although he styles his challenge as one of "improper venue based on *forum non conveniens*," Abubakar is not actually challenging venue, which, like personal jurisdiction, would be waived because he did not raise it in his answer or a motion to dismiss. *Fed. R. Civ. P. 12(h)(1)(B); Fed. R. Civ. P. 12(b).* Under the doctrine of *forum non conveniens*, a trial court has discretion to dismiss a suit over which it has jurisdiction when an alternative forum exists "if it best serves the convenience of the parties and the ends of justice." *Kamel v. Hill-Rom Co., Inc., 108 F.3d 799, 802 (7th Cir. 1997).*

Because "a plaintiff's choice of forum should rarely be disturbed," defendants face a significant hurdle when moving for dismissal on *forum non conveniens* grounds. *Cf. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981)* [**34] (noting that district courts have "more discretion to transfer under [*28 U.S.C.] § 1404(a)* than . . . to dismiss on grounds of *forum non conveniens*"). The defendant's threshold burden is to demonstrate that an adequate alternative forum exists. *Kamel, 108 F.3d at 802* ("As a practical matter, it makes little sense to broach the subject of *forum non conveniens* unless an adequate alternative forum is available to hear the case.") (citing *Piper, 454 U.S. at 254*). "This is a two-part inquiry: availability and adequacy." *Id.* An alternative forum is available if all parties "are amenable to process and are within the

forum's jurisdiction." *Id. at 803.* An alternative forum is adequate "when the parties will not be deprived of all remedies or treated unfairly." *Id.* (citing *Piper, 454 U.S. at 255*).

Abubakar has not met his threshold burden of demonstrating that an adequate alternative forum exists. Abubakar argues only that all parties are amenable to suit in Nigerian courts; he makes no attempt to show the Court that plaintiffs have an adequate remedy in Nigeria and will be treated fairly there. A motion for dismissal [**35] on *forum non conveniens* grounds raises special concerns when the claims against the defendant are brought under the ATCA for torture and other human rights abuses. Dismissal "can represent a huge setback in a plaintiff's efforts to seek reparations for acts of torture" due to "the enormous difficulty of bringing suits to vindicate such abuses." *Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 105, 106 (2d Cir. 2000).* For example, in the complaint, plaintiffs intimate that the Nigerian courts were to some extent complicit with the military regime. *See, e.g.*, Am. Compl.P P 9, 11, 21. Though this may no longer be the case, Abubakar bears the burden of demonstrating that dismissal would leave plaintiffs with an adequate remedy. *Cf.* H.R. Rep. No. 102-367, pt. 1, at 3 (1991) ("Judicial protections against flagrant human rights violations are often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law. The general collapse of democratic institutions characteristic of countries scourged by massive violations of fundamental rights rarely leaves the judiciary [**36] intact."). In light of his failure to do so, and mindful that

"the plaintiff's choice of forum should rarely be disturbed," the Court declines to exercise its discretion to dismiss this action on *forum non conveniens* grounds. *Gulf Oil Corp. v. Gilbert,* [*919] *330 U.S. 501, 508, 91 L. Ed. 1055, 67 S. Ct. 839 (1947).*

D. Plaintiff Abiola's Standing

Abubakar contends that plaintiff Abiola lacks standing to bring this suit on behalf of her parents' estates, as she is only one of numerous heirs and has not shown that she is the estates' administrator. This is a significant issue. In federal court, "every action [must] be presented in the name of the real party in interest." *Fed. R. Civ. P 17(a). See generally, Wilson v. Sundstrand Corp., 2002 U.S. Dist. LEXIS 1213, No. 99 C 6944, 2002 WL 99745 (N.D. Ill. Jan. 25, 2002).* But because this issue does not implicate subject matter jurisdiction (the issue we had directed Abubakar to address in the present motion), Abiola has not yet addressed it. The Court directs her to do so forthwith by filing a memorandum within fourteen days of this order. Defendant's reply is due seven days thereafter. Both memoranda must comply with the [**37] page limitations in the Local Rules.

CONCLUSION

For the reasons stated above, defendant's motion for summary judgment [41-1, 45-1] is granted in part and denied in part. Because he was Nigeria's head of state between June 8, 1998 and May 29, 1999, Abubakar is entitled to sovereign immunity with respect to any claims that arise from his acts during this period. The Court therefore dismisses plaintiffs' claims that arise from defendant's conduct while he was head of state.

Defendant's motion is otherwise denied, except with regard to the issue of Abiola's capacity to sue, which the Court will address after receiving the parties' supplemental memoranda on the issue. Plaintiffs' motion to deem facts admitted [34-1] is denied; the Court directs defendant to respond to plaintiffs' request to admit facts within 30 days of this order. Abubakar's other pending motion [42-1] is terminated.

MATTHEW F. KENNELLY

United States District Judge

Date: June 17, 2003

n1 The following recitation adopts plaintiffs' version of the events but should not be considered as a finding regarding the accuracy of that version.

n2 This ruling council was known at different times as the Supreme Military Council, the Armed Forces Ruling Council, and the Provisional Ruling Council. The Court will refer to this body as the Provisional Ruling Council, its name under Generals Abacha and Abubakar.

n3 The sovereign immunity concerns that were prevalent in 1976 also lend support to the inference that head-of-state immunity was not in the forefront of Congress's mind. As one district court has recently observed,

> During the fifteen years that spanned the issuance of the Tate Letter and the enactment of the FSIA the bulk of sovereign immunity litigation recorded, not only in United States

> courts but in other countries, entailed commercial disputes involving foreign state public entities. In a compilation of sovereign immunity decisions covering this period, the State Department reported only two instances in which immunity determinations related specifically to suits brought against heads-of-state.

See Tachiona, 169 F. Supp. 2d at 275 (footnotes omitted) (citing Jerrold L. Mallory, Note, Resolving Confusion Over Head of State Immunity: The Defined Rights of Kings, *86 Colum. L. Rev. 169, 176 n.26 (1986)* (citing Sovereign Immunity Decisions of the Department of State (May 1952 - Jan. 1977), 1977 Dig. U.S. Prac. Int'l L. 1017)). One commentator of the day, remarking on the emergence in the international community of "complex and detailed rules" for denying sovereign immunity for states' commercial ventures, noted that "None of this large and complex body of international law has been drawn up with the position of heads of state in mind." Satow's Guide to Diplomatic Practice 9 (Lord Gore-Booth ed., 5th ed. 1979).

(2)

05-788

No. 05-[redacted]

IN THE

Supreme Court of the United States

GEN. (RTD.) ABDUSALAMI ABUBAKAR,
Petitioner,

v.

CHIEF ANTHONY ENAHORO, DR. ARTHUR NWANKWO AND HAFSAT ABIOLA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly interpreted the Foreign Sovereign Immunities Act (FSIA) in determining that based on the language of the FSIA, the act does not apply to the Defendant/Petitioner for acts of torture and extra-judicial killing which were clearly outside the scope of official authority.

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STATEMENT OF THE CASE

Factual Background

On May 23rd 2005, the United States Court of Appeals for the Seventh Circuit: in *Enahoro v Abubakar* (Interlocutory Appeal) rejected the Petitioner, General Abubakar's claim that the Foreign Sovereign Immunities Act (FSIA) applies to individuals in government who committed acts of torture, extra judicial killings. The Seventh Circuit ruled that the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq*. does not provide immunity to individuals (including the petitioner, General Abdulsalami Abubakar.) who committed acts of torture, extra judicial killing and crimes against humanity since those crimes fall outside the scope of official authority.

This interlocutory appeal relates to the suit brought by Respondents in the U.S. District Court for the Northern District of Illinois against the petitioner, Abdulsalami Abubakar, a former Nigerian General who was a member of the military junta. The Respondents made allegations of torture and killings that occurred during that time and alleged that the Respondent, who had the third highest political and military position, was one of the Generals behind the torture and the killings.

Respondent Hafsat Abiola is the daughter of Nigerian pro-democracy activists; she claims that petitioner is responsible for the deaths of her parents. Her father, M.K.O. Abiola, in fact, was a candidate for president in 1993. After the elec-

tion, plaintiff Abiola's father was arrested, detained and charged with treason. He was kept in prison under inhumane conditions, was tortured, and denied access to lawyers, doctors, and his family. He later died in prison in July 1998, shortly after General Abubakar assumed control of the military regime. Plaintiff Abiola's mother, Alhaja Kudirat Abiola, was also a pro-democracy activist. After her husband was imprisoned she began a campaign to free him and continued a call for the democratization of Nigeria. The complaint alleges that she received menacing telephone calls warning her of the consequences of continuing to demand the release of her husband. In June 1996, she was murdered in broad daylight in her car on the streets of Lagos City. She had been shot multiple times.

Respondent Anthony Enahoro is a political activist who played a leading role in Nigeria's independence from Great Britain in 1960. In 1994, when he was 70 years old, he was arrested and imprisoned by the junta for 4 months. During his detention he was not provided medical treatment even though he was a diabetic. Respondent Arthur Nwankwo, another political activist, was arrested in June 1998. While in detention, was stripped naked. flogged, tortured and taken away in the trunk of a car. He also was denied medical treatment for the entire period that he was in custody.

Petitioner Abubakar has never denied ever committing the stated offenses. Instead, he argued at pp 14 - 15 of his petition as he has always maintained since the inception of this case that "*the alleged abuse of power by the Nigerian officials for actions taken in Nigeria are the acts of a sovereign*". The Petitioner erroneously equated himself with a

Sovereign Nigeria and submitted that the *" United States courts lack jurisdiction over this suit under the FSIA"* (Emphasis supplied).

Following the decision of the district court that the FSIA does not apply to individuals for acts committed outside the scope of their authority, Petitioner brought the interlocutory appeal to have this question decided. The Court of Appeals affirmed the decision of the district court, holding that the petitioner acted outside the scope of his official authority by committing the acts of torture, extra judicial killing and crimes against humanity as alleged by the Plaintiffs in their complaint.

The Seventh Circuit further held that since the FSIA did not apply, jurisdiction over Abubakar had to be based on other grounds. The court then found that it had jurisdiction under the Alien Tort Statute (ATS), which provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Citing the Supreme Court decision in *Sosa v Alvarez-Machain*, the court held that the ATS, in this case, could however not provide a cause of action, but merely a jurisdictional basis. The court concluded, "that the cause of action Congress provided in the Torture Victims Protection Act [("TVPA")] is the one which plaintiffs alleging torture or extra judicial killings must plead." The court further stated: "We find that the [Torture Victim Protection] Act does, in fact, occupy the field." It is a requirement of the TVPA that remedies be exhausted, and the court noted, "Nothing in the record indicates that they [plaintiffs] have exhausted their remedies." Due to the

fact that the Respondents have not brought the suit under the TVPA, the court remanded "for a determination regarding whether the plaintiffs should be allowed to amend their complaint to state such a claim."

The Court of Appeals then immediately issued a mandate to the lower Court for a determination consistent with its decision. The Petitioner's Attorney did not move to stay the mandate pending the filing of a petition for a Writ of Certiorari in the Supreme Court. Instead, Petitioner's attorney followed the case to the Lower Court and participated in the status Conference where the Presiding Judge, Hon. Matthew F. Kennelly of the Northern District of Illinois Ordered the Respondents to amend their Complaint to include the TVPA and gave the Petitioner another chance to file a second Motion to Dismiss for alleged non exhaustion of local remedies in Nigeria consistent with the Court of Appeals Mandate.

Petitioner's Counsel filed a second Motion to Dismiss on exhaustion requirements of TVPA. In a Memorandum of Opinion by the presiding Judge, Hon. Matthew Kennelly, the Petitioner's second Motion to Dismiss was denied. Hence the petitioner is pursuing this petition concurrently with the substantive case before Honorable Kennelly at the District court.

SUMMARY OF ARGUMENT

In this case, no one contends that an exception to immunity applies. If the petitioner is covered by the FSIA, he is immune; no exception is relevant; and the suit would have been dismissed. Therefore, the only issue is whether the statute applies to individuals (who are connected with the government) who commit torture, extra judicial killing and crimes against humanity, as opposed to the state itself and its agencies. Before the instant case, the Seventh Circuit looked at a similar question in *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004) which involved a head of state, and concluded that the FSIA did not apply to heads of state. Faced with the same question in the instant case, the Seventh Circuit held inter – alia, that:

> "The FSIA defines a foreign state to include a political subdivision, agency or instrumentality of a foreign state but makes no mention of heads of state." *Ye*, 383 F.3d at 625.

The Seventh Circuit properly noted that the FSIA did not seem to subscribe to Louis XIV's not-so-modest view that "L'etat, c'est moi." How much less, then, could the statute apply to persons, like the petitioner, General Abubakar, when he was simply a member of a committee, even if, as seems likely, a committee that ran the country?".

The language of the FSIA supports the Seventh Circuit's conclusion. The overriding concern of the Act, as set out in 28 U.S.C. § 1602, is allowing judgments against foreign sovereigns "in connection with their commercial activities." The statute was passed so immunity determinations in such con

texts would be made "by courts of the United States and of the States . . .", not by the executive branch of the government. Section 1604 provides that a "foreign state" is immune unless certain exceptions apply. Under § 1603(a), a foreign state includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state . . . ."

The definition does not explicitly include individuals who either head the government or participate in it at some high level. The Petitioner argues, however, that "separate legal person" must mean an individual. But if it was a natural person Congress intended to refer to, it is hard to see why the phrase "separate legal person" would be used, having as it does the ring of the familiar legal concept that corporations are persons, which are subject to suit. Given that the phrase "corporate or otherwise" follows on the heels of "separate legal person," the Seventh Circuit properly held that the latter phrase refers to a legal fiction—a business entity that is a legal person. If Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms.

As the Seventh Circuit held, per incuriam, while disagreeing with the decision in *Chuidian v. Philippine National Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990), the FSIA has been applied to individuals, but in those cases one thing is clear: the individual must have been acting in his official capacity. If he is not, there is no immunity. However, torture, extra-judicially killing and acts of crimes against humanity are clearly not within the scope of official capacity.

The Seventh Circuit properly held that not only does the Chuidian decision seem upside down as a matter of logic, but it ignores the traditional burden of proof on immunity issues under the FSIA. The party claiming FSIA immunity bears the initial burden of proof of establishing a prima facie case that it satisfies the FSIA's definition of a foreign state. The ultimate burden of proving immunity rests with the foreign state. *Int'l Ins. Co. v. Caja Nacional de Ahorro y Seguro*, 293 F.3d 392, 397 (7th Cir. 2002); *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Virtual Countries, Inc. v. Republic of S. Africa*, 300 F.3d 230, 241 (2nd Cir. 2002).

A case, which is similar to the instant case, is *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992). The Court concluded that the Defendant, who committed acts of torture and murder while she was a President acted on her own authority and not on the authority of the Republic of the Philippines. Therefore, she was not entitled to immunity. That also meant that there was also no jurisdiction under the FSIA and that the Alien Tort Statute (ATS) was the sole basis for jurisdiction in the case.

In this case, the Seventh Circuit properly concluded, based on the language of the Statute that the FSIA does not apply to the respondent, General Abubakar; it is therefore also clear that the Act does not provide jurisdiction over the case. If General Abubakar were covered, the FSIA would be the only basis for subject matter jurisdiction over him.

The Supreme Court has said in *Argentine Republic v Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989):

> We think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts. The corollary proposition in *Argentine Republic* is that the Alien Tort Statute cannot provide jurisdiction over foreign sovereigns but remains a jurisdictional basis for suits against other defendants. And the ATS is, in fact, the basis on which plaintiffs in our case claim jurisdiction.

After the District court issued its decision in this case the Supreme Court extensively considered the ATS. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), established that the ATS is a jurisdictional statute that creates no new causes of action. In sum, this Court has held in Sosa *v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) that "the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping . . . ." At 2764. Alvarez's case against Sosa was properly dismissed because a "single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy". At 2769.

The plaintiffs in the instant action allege significantly more appalling violations than did Alvarez. Their allegations fall into two primary categories that the *Sosa* Court specifically recognized as violations of the law of nations: torture and killing. The Supreme Court also noted that Congress has provided an "unambiguous" basis for "federal claims of tor-

ture and extrajudicial killing" in the Torture Victim Protection Act of 1991, 106 Stat. 73. *Sosa*, 124 S. Ct. at 2763.

REASONS FOR DENYING THE PETITION

I. The Seventh Circuit Correctly Held that Petitioner fails to demonstrate that FSIA provides immunity for former Government Officials for acts of torture and extra-judicial killing, which clearly fall outside the scope of official Authority

The decision below is fully consistent with the decisions of other Courts of Appeals. There is no conflict among the Circuits on the question presented in the petition and no other compelling reason for review. This Court has repeatedly denied petitions for writs of certiorari in Alien Tort Act (ATA) cases, *see, e.g.*, *Wiwa* v *Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Abebe-Jira* v. *Negewo*, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996); *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Trajano* v. *Marcos*, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993); *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), and should deny the instant petition as well.

Enacted in 1789 as part of the First Judiciary Act, the ATA provides:

> "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

28 U.S.C. § 1350. The federal courts have interpreted the ATA in a manner, which Congress endorsed when it passed the Torture Victim Protection Act of 1991 (TVPA).

In 1789, the violations of international law that the First Congress probably had in mind were those Blackstone had identified as "[t]he principal offences against the law of nations . . .; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and 3. Piracy." See William Blackstone, Commentaries 68.14. A highly publicized assault on the French ambassador in 1784 is thought to have been the specific impetus for including this provision in the First Judiciary Act. *See* Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 469-70 (1989); William R.Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 491-94 (1986); Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. Int'l L. & Pol. 1, 24-27 (1985). Yet no statute created a separate cause of action for these violations of the law of nations or any others, and even Judge Bork was forced to acknowledge that a separate cause of action should not be required. In 1781, the Continental Congress had specifically listed the first two offenses in a resolution recommending that the States enact laws to punish infractions of the law of nations and to authorize suits

for damages by the injured party. Resolution of Nov. 23, 1781, 21 Journals of the Continental Congress 1774-1789, at 1136-37.

The First Congress passed no statutes granting a separate cause of action to bring suit under the ATA because that requirement was unknown at the time. The phrase "cause of action" became a legal term of art only in 1848, when the New York Code of Civil Procedure abolished the distinction between law and equity "and simply required a plaintiff to include in his complaint '[a] statement of the facts constituting the cause of action.' " *Davis v. Passman*, 442 U.S. 228, 237 (1979) (quoting 1848 N.Y. Laws, ch. 379, § 120(2).

In 1789, the law of nations was considered to be part of the common law, and the First Congress expected "torts in violation of the law of nations" to be actionable at common law just as other torts were. To limit the ATA to those violations that were recognized in 1789 would be contrary to the expectations of the First Congress, which understood that the law of nations evolves. *See, e.g.*, *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J., concurring) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."); *United States* v. *La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.), *overruled on other grounds*, 23 U.S. (10 Wheat.) 66 (1825) ("It does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations."). It would also be contrary to the text of the ATA,

which does not enumerate specific torts but rather provides jurisdiction over "*any* civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (emphasis added).

The Petitioner invites this Court effectively to repeal the ATA by engrafting onto it Foreign Sovereign Immunities (FSIA) for acts committed outside the scope of authority and in violation of the law of nations. Such repeal if allowed would be contrary to the intent of the Congress that passed the ATA and of the Congress that passed the TVPA and would the purpose for which these laws were passed by the congress. Petitioner's FSIA' argument has properly been rejected by every Court of Appeals to have considered it.

II. The Seventh Circuit Correctly held that murder, torture and other crimes against humanity are not official acts of government protected by FSI

The Court of Appeals have unanimously and correctly rejected petitioner's argument that government officials are immune from acts of torture, murder and violation of jus cogen rules of international law community while in office. This is because there are a growing number of court decisions indicating that U.S. courts are not extending FSIA immunity to officials responsible for the most significant violations of *jus cogens* norms of international law because they are deemed, by definition, unlawful and unauthorized in nature, and outside the scope of an official's authority.

The underlying justification for revoking immunity for officials who violate *jus cogens* norms of international law is that a sovereign state cannot defend these acts as official

since "*jus cogens* violations are considered violations of peremptory norms, from which no derogation is permitted." *Presbyterian Church of Sudan v. Talisman Energy, Inc. and the Republic of Sudan*, 244 See, e.g., *In re Estate of Ferdinand E. Marcos, Human Rights Litig. ("Hilao II")*, 25 F.3d 1467, 1471 (9th Cir.1994) (finding that acts of torture, execution, and disappearance were "clearly outside [Marcos'] authority as President."); *Trajano v. Marcos*, 978 F.2d 493, 498 (9th Cir.1992), *cert. denied,* 508 U.S. 972 (1993) (alleged acts of torture and summary execution "cannot have been taken within any official mandate," and therefore immunity does not apply.); *Cabiri v. Assasie-Gyimah*, 921 F.Supp. 1189, 1197 (S.D.N.Y.1996) (agreeing that FSIA is inapplicable to the "commission of acts which exceed the lawful boundaries of a defendant's authority."); *Xuncax v. Gramajo*, 886 F.Supp. 162, 175 (D.Mass.1995) (refusing to apply immunity because the alleged violations of human rights "exceed[ed] anything that might be considered to have been lawfully within the scope of Gramajo's official authority."); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir.1990) (FSIA immunity is lost if an official acts "completely outside his governmental authority."

III. The Courts Of Appeals Have Consistently Held That ATCA Jurisdiction Is Limited To Well-Established, Universally Recognized Norms Of International Law.

In *Filartiga*, the Second Circuit held that the ATA conferred jurisdiction over torts such as official torture that violate "well-established, universally recognized norms of international law," 630 F.2d at 888, a standard to which the

Second Circuit has adhered ever since. *See, e.g.*, *Flores*, 343 F.3d at 154 (citing *Filartiga* for the proposition that "customary international law [includes only] well established, universally recognized norms of international law"); *Kadic*, 70 F.3d at 239 (stating that if "the defendant's alleged conduct violates 'well-established, universally recognized norms of international law,' then federal jurisdiction exists under the Alien Tort Act"); *Zapata* v. *Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (per curiam) (citing *Filartiga* for the proposition that the ATA applies only to "violations of universally recognized principles of international law"). This standard ensures that federal courts will apply only those international norms that are clearly accepted as binding by the community of nations. *See Filartiga*, 630 F.2d at 881 ("The requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.").

As the Second Circuit subsequently noted in *Kadic*, "*Filartiga* established that universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion." 70 F.3d at 249. Other Circuits have consistently followed the approach set forth in *Filartiga*. In *Hilao*, the Ninth Circuit relied expressly upon *Filartiga* in holding that "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory."

25 F.3d at 1475; *see also Alvarez-Machain*, 331 F.3d at 612 ("In [*Hilao*] we were careful to limit actionable violations to those international norms that are 'specific, universal, and obligatory.' "); *Papa* v. *United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (noting that "plaintiffs must allege a violation of 'specific, universal, and obligatory' international norms as part of an ATA claim"); *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998) ("The applicable norm of international law must be 'specific, universal, and obligatory.').

The Eleventh and Fifth Circuits have also echoed the *Filartiga* approach. In *Abebe-Jira*, 72 F.3d 844, the Eleventh Circuit held that torture was actionable under the ATA, citing case law from both the Second and Ninth Circuits. In *Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999), the Fifth Circuit held that claims based on environmental damage were not actionable under the ATA because they did not meet the standard articulated by the Second Circuit. In neither case did the Court of Appeals express any concern about a conflict among the Circuits.

Petitioner does not and could not assert that there is any substantive difference between the "well-established, universally recognized" formulation used by the Seventh Circuit and the "specific, universal, and obligatory" formulation used by the Second and Ninth. In short, there is simply no dispute among the lower Courts that the ATA confers jurisdiction over torts that violate well-established universally recognized norms of international law. This Court should disregard Petitioner's attempt to create such a conflict among

the circuits by Petitioner's misinterpretation of the decisions of the various circuits.

IV. The Courts of Appeals are not divided on the Proper reach of ATCA and have developed a consistent and manageable jurisprudence.

The Petitioner contends that the Court of Appeals, Seventh Circuit was wrong in its construction of the FSIA when it held that based on the language of the statute that the FSIA does not apply to the Petitioner and therefore, the FSIA does not provide jurisdiction over the case. Petitioner, not the Seventh Circuit, has misinterpreted the Act.

The Courts of Appeals have consistently limited jurisdiction under the ATA to torts that violate "well established, universally recognized norms of international law." *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980). As *Filartiga* itself pointed out, this standard is a "stringent one," *id.* at 881, and claims that have failed to meet it have been readily dismissed. *See, e.g.*, *Alvarez-Machain* v. *United States*, 331 F.3d 604, 617-20 (9th Cir. 2003) (en banc) (holding that claim for transborder abduction does not meet ATA standard for jurisdiction); *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140, 172 (2d Cir. 2003) (holding that claims based on environmental pollution do not meet ATA standard for jurisdiction).

By limiting jurisdiction to "universally recognized" norms, the federal courts have avoided imposing United States standards of conduct extraterritorially and have avoided unnecessary friction with foreign governments.

Congress endorsed *Filartiga*'s approach when it passed the Torture Victim Protection Act of 1991 and has continued to expand the availability of federal courts to hear claims based on violations of international law.

In addition, the Supreme Court has repeatedly established the criteria for determining the content and applicability of the law of nations in domestic litigation when Congress has not addressed the international standard. The touchstone is The Paquete Habana, 175 U.S. 677 (1900), where the Court stated:

> International law is part of our law, and must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators . . . .Id., at 700. In Paquete Habana and its progeny, the Supreme Court approved the application of international law in U.S. courts even in the absence of positive Congressional enactment.

V. Federal Courts Applying This Standard Have Distinguished Between Claims That Are Properly Brought Under The ATA And Those That Are Not.

Since *Filartiga*, the federal courts have engaged in a careful and measured analysis of the individual claims raised in ATA cases, hearing those claims that have been based on violations of well-established, universally recognized norms of international law and dismissing those claims that have not. For example, the federal courts have recognized that the prohibition against genocide constitutes a well-established, universally recognized norm of international law.

In *Kadic*, the Second Circuit found that allegations of rape, forced impregnation, torture, and murder with the intent to destroy religious and ethnic groups in the territory of the former Yugoslavia clearly stated a violation of the international norm against genocide. 70 F.3d at 242. In *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), an association of religious and community groups alleged that defendants collaborated with the Sudanese government in a campaign of religious and ethnic cleansing against the non-Muslim population in southern Sudan. Not surprisingly, the district court found that such genocidal acts were clearly prohibited under international law and were subject to the ATA. *See also Mehinovic* v. *Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (claims based on genocide in Bosnia-Herzegovina); *Mushikiwabo* v. *Barayagwiza*, No. 94 CIV. 3267 (JSM), 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996) (claims based on genocide in Rwanda). Federal courts have also recognized the viability of ATA suits for such well established claims as

torture and summary execution. *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994); *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992); *Presbyterian Church of the Sudan* v. *Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Wiwa* v. *Royal Dutch Petroleum Co.*, No. 96 CIV. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002); *Tachiona* v. *Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002); *Mehinovic* v. *Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); *Doe* v. *Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); *Xuncax* v. *Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Paul* v. *Avril*, 901 F. Supp. 330 (S.D. Fla. 1994); *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987); *Estate of Rodriquez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003); *Tachiona* v. *Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002); *Estate of Cabello* v. *Fernandez-Larios*, 157 F. Supp. 2d 1345 (S.D. Fla. 2001); *Wiwa* v. *Royal Dutch Petroleum Co.*, No. 96 CIV. 8386 (KMW); 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002); *Xuncax* v. *Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).

On the other hand, courts have rejected claims that are not based on well-established, universally recognized norms of international law. For example, federal courts have repeatedly dismissed ATA cases based on environmental harms. Most recently, in *Flores*, 343 F.3d at 140, the Second Circuit concluded after careful analysis that the alleged rights to life and health were insufficiently definite to constitute rules of customary international law and that customary international law did not prohibit international pollution. *See also Beanal*,

197 F.3d 161; *Sarei* v. *Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1160-61 (C.D. Cal. 2002); *Amlon Metals, Inc.* v. *FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991). Courts have also dismissed panoply of other ATA actions that failed to raise recognized claims under international law such as fraud, negligence, censorship, commercial torts, and conversion. ;

Indeed, the decision below illustrates the ability of federal courts to apply the ATA's jurisdictional standard. For while the Ninth Circuit concluded that here exists a clear and universally recognized norm prohibiting arbitrary arrest and detention, the experience of more than twenty years shows that the federal courts have had little difficulty determining the contours of customary international law or distinguishing claims that are based on well established, universally recognized norms from those that are not.

VI. Acts of torture and extra - judicial killing are listed as Part of the general exceptions to the jurisdictional immunity of a foreign State under the Restrictive Theory.

Since the enactment of the Act in 1976, the general exceptions to the jurisdictional immunity of a foreign state have expanded, moving beyond the realm of "commercial activity". Most recently, P.L. 105-175 of May 11, 1998 further expanded the restrictive theory. Specifically, 28 U.S.C. 1605 now provides that a foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case in: Section 1605(a)(7) – "money damages are sought against a foreign state for personal injury or death

that was caused by an act of ***torture, extrajudicial killing (Emphasis supplied)***, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act, if the foreign state is designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App 2405(j) or Section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371)".

VII. Petitioner's Cause FSIA Argument Rests On An Anachronism and Would Make the ATCA Meaningless.

The Petitioner's position rests on a self-serving anachronism. And in his fruitless search for authority to establish that the ATCA action is caught by the FSIA badly over interprets the scope of the FSIA. This Court should not assume that the First Congress intended to enact a statute that was meaningless. But if Petitioner is correct that the Plaintiffs claims against the Defendant are caught by the provision of the FSIA, that statute and indeed the TVPA would have been a nullity the moment they were passed.

In short, Petitioner's argument rests on an anachronism. It would also defeat the intent of the First Congress, which expected torts in violation of the law of nations to be actionable at common law without any further congressional action.

VIII. The Seventh Circuit's Ruling is consistent with the U.S interest in Vindicating Human Rights Violations.

Another factor militating against the Petitioner's contention of FSIA immunity is the strong interest of the U.S in vindicating international human rights violations and in holding the perpetrators of these offenses personally liable. The Seventh Circuit's decision is consistent with this position and should not be disturbed.

As noted above, the allegations in the complaint include torture and extra-judicial killing. These acts are universally condemned and the U.S has strong interest in seeing violations of international law vindicated. See e.g, *Testa v. Katt*, 330 U.S 386, 390 n.4 (1947); *Wiwa v. Royal Dutch Petroleum*, 226 F. 3d 88 (2d Cir. 2000) *cert. denied*, 532 U.S. 941 (2001).

The nature of this case makes it similar to Wiwa and this Court correctly denied certification in *Wiwa, cert. denied*, 532 U.S. 941 (2001).

In multiple public pronouncements, the U.S. Department of State has also recognized that the ATCA establishes both subject matter jurisdiction and a cause of action for serious violations of international law. In describing the ATCA in its official submission to the U.N. Committee against Torture, for example, the Government of the United States declared that U.S. law provides *statutory rights of action* for civil damages for acts of torture occurring outside the United States. One statutory basis for such suits, the Department added, is the Alien Tort Claims Act, which represents an

early effort to provide a judicial remedy to individuals whose rights have been violated under international law. *See Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America, U.N. Doc. CAT/C/28/Add.5 (2000), at 60 (emphasis supplied).*

Similarly, in its submission to the U.N. Commission on Human Rights, the government declared that the "statute was originally enacted to provide *a remedy to individuals* who suffered a 'tort' at the hands of privateers seeking prize money under the law of admiralty. More recently, it has been applied to cases of human rights violations." ***Commission on Human Rights, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, U.N. Doc. E/CN.4/1996/29/Add.2 (1996), at para. 15 (emphasis supplied).***

In *Filartiga v. Pena-Irala*, the U. S government argued that the law of nations as it had evolved obligated every state to respect the right of its own citizens to be free of torture and that this obligation bound the United States as well even in the absence of additional Congressional enactments. According to the government, the modern-day torturer had – like the pirate in the eighteenth century – become *hostis humani generis*, the enemy of all mankind, and therefore liable wherever he might be found. The United States took a similar position in 1995 in *Kadic v. Karadzic Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

CONCLUSION

For the reasons set forth above, Plaintiffs/Respondents respectfully request that the petition for a writ of certiorari filed by the Defendant/Petitioner be denied.

Respectfully submitted,

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